Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1997

In re the Marriage of MARY K.
and JAMES M. ODDINO

MARY K. ODDINO
Petitioner,

v.

JAMES M. ODDINO
Respondent;
HUGHES NON-BARGAINING RETIREMENT PLAN,
Respondent;

On Petition for a Writ of Certiorari to the California Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the opinion that an alternate payee who seeks to have her domestic relations order found qualified and enforced against a pension plan may only sue under the civil enforcement procedures for beneficiaries and participants at 26 U.S.C. §1132

   a) violate the statutory denial of beneficiary status to such alternate payees at §1056(d)(3)(J),

   b) ignore the availability of all State law relating to Qualified Domestic Relations Orders ("QDROs") at §1144(b)(7), and

   c) thwart the intent of Congress to rely on "State law providing for [QDRO] rights and payments", to apply "State court procedures" for the "enforcement of [QDROs]", and to assure that "the domestic relations court is the appropriate forum to … settle all controversies"?

2. Is the opinion that 26 U.S.C. §1056(d)(3)(E)(i)(II) prohibits QDRO formulas for determining benefits any from referencing an early retirement benefit invalid, and does it frustrate the intent of Congress that

   a) a QDRO may order "all … of the benefits payable with respect to a participant under a plan" per subparagraph (B)(i)(I),

   b) a QDRO may express the amount to pay in any legible manner per subparagraph (C)(ii),

   c) a QDRO provides access to early retirement benefits per subparagraph (E)(i)(I), and

   d) any benefits paid early must be treated as accrued benefits, protected from any denial per §1054(g)(2)?

3. Does permitting payments under a QDRO without the segregated amount it ordered per 26 U.S.C. §1056(d)(3)(H) obstruct the intent of Congress that a QDRO may order payments retroactive to 18 months?

PARTIES

The parties are as stated in the caption, except that the United States Department of Labor and, jointly, the California Employers Law Council and The Employers Group filed amicus briefs at the State Court of Appeals and State Supreme Court on behalf of Claimant.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, MARY K ODDINO (GLASSMAN), (hereinafter "Petitioner" or "MARY") respectfully prays that a writ of certiorari issue to review the opinion of the California Supreme Court, rehearing of which it denied on October 15, 1997.

OPINIONS AND ORDERS BELOW

The opinion of the California Supreme Court *In re Marriage of Oddino* (1997) ("*Oddino II*") is reported at 16 Cal.4th 67 and is reprinted at page App.1, Appendix A. It reversed the California Court of Appeals opinion *In re Marriage of Oddino* (1996) ("*Oddino I*"), reported at 48 Cal.App.4th 965, is reprinted at page App.27, Appendix B. The trial court Statement of Decision and Order on Order to Show Cause is reprinted at page App.37, Appendix C. The California Supreme Court Order denying rehearing October 15, 1997 is reprinted at page App.40, Appendix D. The Stipulation and Order re Modification of Interlocutory Judgment and Qualified Domestic Relations Order ("QDRO"), March 24, 1989 is reprinted at page App.41, Appendix E.

STATEMENT OF JURISDICTION

The ruling of the California Supreme Court presents important issues of federal law which the Supreme Court of the United States should settle. Included are how the amount and timing of pension benefits in a Qualified Domestic Relations Order ("QDRO") are determined, whether the Employee Retirement Income Security Act of 1974, as amended by the Retirement Equity Act of 1984 ("REA") contains the conflicting sections the California Supreme Court found; and whether State court jurisdiction to

determine and enforce a QDRO includes all State laws related to QDROs, or whether only federal courts and law are available.

The Opinion of the California Supreme Court was filed on July 28, 1997, and that Court denied rehearing on October 15, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

STATUTES AND REGULATIONS

Applicable parts of the Employee Retirement Income Security Act of 1974, as amended by the Retirement Equity Act of 1984 ("REA"), 26 U.S.C. §1001 et seq., and Federal Regulations issued thereunder by the Secretaries of Labor and the Treasury.

STATEMENT OF THE CASE

Mary K. Oddino (Glassman) (hereafter, "MARY" or "Petitioner") Petitions for a Writ of Certiorari to the California Supreme Court to review its interpretations of federal law *Oddino II*, (Appendix A, page App.1).

MARY and her husband, James M. Oddino ("JAMES") dissolved their marriage in 1983. They reserved jurisdiction of his pension with the Hughes Aircraft Non-Bargaining Retirement Plan ("Claimant" or "Plan")[1], an ERISA-qualified, defined benefit plan.[2] As his eligibility for early retirement neared, JAMES and MARY created a Domestic Relations Order ("DRO") by filling in the Plan's blank form QDRO. The Plan had confirmed in its "Retirement Plan Projection for MARY ODDINO GLASSMAN" that her benefits would be a share of his early retirement benefit ("ERB"), a share then worth $3,632 per month[3]. The DRO ordered Claimant to pay MARY where "[her] interest in the [Plan] is to be determined by the following formula:" 36.6231% of JAMES' accrued benefit as of April 1, 1988,

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[1]The subject Plan covers 72,716 participants or beneficiaries, with assets exceeding liabilities of $5,517,311,000 according to its latest (1996) Summary Annual Report. According to Pensions & Investments News, a trade paper for plan administrators, the trust funds for the group of plans administered by Claimant, including the subject Plan, are worth $9.6 billion, and rank 64th among U.S. companies. These data for Hughes do not include General Motors, until December, 1997 its parent company, which is ranked No. 2 with assets of $72 billion. The total of the top 166 pension trust funds is $2.2 trillion.

[2]A defined benefit plan specifies or "determines" life time pensions. They are made definitely determinable by two factors, an annuity amount and a start date. Such a benefit is called a "Single Life Annuity", where single life is a reference to actuarial dependence on only the life expectancy of one person, the participant. Under the subject plan, the normal retirement age benefit (herein, "NRAB") and the Vested Retirement Benefit ("VRB") are determined from age 65, the Plan normal retirement age.

[3]The stated dollar amount of pension benefits in the Petition is the initial monthly benefit under the Plan's Five Year Period Certain option, which MARY elected.

the date JAMES was first eligible to retire. He had at that time earned the Plan's ERB[4] under its Rule of 75[5].

After being served with the DRO, on June 1, 1989 Claimant wrote MARY confirming her DRO was a QDRO, but refusing to pay either the $3,632 per month it had estimated to her, or as of April 1, 1988. Claimant told MARY it would pay only $1,370 per month. This was after reducing for an "early retirement subsidy", a term nowhere found in any Plan document. Claimant then offered payment retroactive as of April 1, 1989, asserting the Plan had no retroactivity provisions.

MARY wrote back requesting justification for the subsidy deduction, a showing of how her benefits were calculated, and an official, standard Retirement Plan Projection. She received none of these, but on November 15, 1989 Claimant did write to inform her that the U.S. Circuit and District Court decisions[6] invoking §1054(g)(2) did not

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[4]The Plan determines the ERB as of the actual or assumed date of separation, and it may be paid later actuarially increased. The ERB annuity is the same as the annuity in the Accrued Benefit, also determined on the date of separation. The Plan has no provision to pay the Accrued Benefit except as an ERB per the Rule of 75.

[5] The term "Rule of 75" is not used in the Plan, it is ambiguous in the Summary Plan Description, and Claimant has used the synonym "Magic 75". The elements of this rule of eligibility for the Plan's Accrued Benefit include age at least 55, and years of service plus age, of at least 75. Claimant and the Court below agreed that actual retirement was required, but the assumption of actual retirement is in both the Plan and ERISA discussed *infra*.

The Plan has three normal retirement benefits ("NRBs"), the Early Retirement Benefit ("ERB"), the Normal Retirement Age Benefit ("NRAB"), and a Late Retirement Benefit. The Plan also provides that the annuity calculated for any NRB is not less than the largest of any early benefit available by assuming actual separation from the service at any previous time, thus effecting ERISA's NRB definition at §1002(22). See *Oddino I*, p. 973

[6]*American Stores Company, et al, v. American Stores Company Retirement Plan et al* (D. Utah 1989) 716 F.Supp. 1392 ("AmStores'89") reversed (10thCir. 1991) 928 F.2d 986, interpreting *Bencivenga v. Western Pennsylvania Teamsters and Employers Pension Fund.* (3rd Cir.

apply because "Hughes is not attempting to amend its retirement plan". It further asserted that "the [Rule of 75] subsidy ... is an accrued benefit." It said it reduced MARY's benefits by invoking the clause in ERISA 29 U.S.C. §1056(d)(3)(E) ("Subp. (E)"[7]), "taking into account only the present value of benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement". MARY objected.

In March, 1990 the Plan began sending $1,563.70 to her. She then joined the Plan to her dissolution action, and filed an Order to Show Cause ("OSC") to determine the amount of her QDRO benefits and enforce payment. In discovery, Claimant revealed that it had paid 36.6231% of an actuarially reduced Vested Retirement Benefit ("VRB")[8], miscalculated, and as of March 1, 1990, a monthly sum of $1,563.70.

In a Statement of Decision and Order (Appendix C, App.37), the OSC court first found that the QDRO constituted a waiver of MARY's rights to an order for the balance of her payments from JAMES, and so made no determination of the amount due her as community

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1985) 763 F.2d 574 and *Amato v. Western Union International, Inc.* (2nd Cir. 1985) 773 F.2d 1402 *cert. dismissed. Western Union International Inc. v. Amato* 474 U.S. 1113. *American Stores Company v. American Stores Company Retirement Plan* (10th Cir. 1991) 928 F.2d 986 reversed as the law read pre-REA, but agreed that §1054(g)(2) was dispositive post-REA. See footnote 14, *infra.*

[7]Unless otherwise stated, all references of the form "Subp. (X)" are to §1056(d)(3)(X), the QDRO provisions at Subp. (A) through (N). The Internal Revenue Code contains these same provisions with different subparagraph designations and titles added at 26 U.S.C. §414(p).

[8]Every defined benefit plan must contain both an NRAB and a VRB determined from normal retirement age. ERISA mandates at §1054(b)(1) the VRB annuity is a fraction not greater than one of the annuity amount in the plan's Accrued Benefit. This makes the VRB annuity equal to the Accrued Benefit annuity when the participant is 100% vested, after 10 years service.

A participant earns his VRB unconditionally, after separating from the service only if he has not earned an NRB. The Plan determines the VRB from age 65, but optionally permits it to be paid early after age 55, reduced by the Plan's Early Retirement Factor.

property.[9] It then found that the Plan's ERB "constitutes a subsidy rather than an accrued benefit", and disallowed her QDRO formula ordering paid a percentage of the ERB (as authorized per Subp. (C)(ii)). Next, instead of ruling on the effective date for payment of her benefits, the OSC court obtusely found "Claimant did not take an unreasonable amount of time to approve the [QDRO]", and anyway the amount paid was sufficient "to recompense Petitioner for the period of time prior to commencement of such payments". It further found that "Estoppel is not allowed in this action as a matter of law under [ERISA]." On these interpretations of federal law, the OSC court denied MARY any relief. She appealed.

On August 16, 1996, the Second Appellate District of the Court of Appeal, Division Two, reversed. *Oddino I*, (Appendix C, App. 37). It awarded MARY her full benefits of $3,689.60 per month as of April 1, 1988, plus interest. The Court granted rehearing, and permitted the Department of Labor ("DOL") and jointly the California Employment Law Council and The Employers Group (hereafter "CELC") to file briefs as *amicus curiae*. Claimant then retracted its determination that MARY's DRO was a QDRO, and DOL contended that California courts lacked jurisdiction. The Court of Appeal found for MARY, and found DOL's position without merit and not properly before the Court.

Claimant, DOL[10], and CELC[11] then sought review in the California Supreme Court.[12] They contended that the action

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[9]The federal question posed by the OSC court is whether the QDRO acts to waive any other State claims for benefits against the employer or ex-spouse.

[10]The Secretary of Labor as Chairman of Pension Benefit Guaranty Corporation ("PBGC") insures "nearly 33 million participants in almost 48,000 defined benefit plans", but administers at a profit the pensions of over 200,000 payees and over 240,000 deferred payees from terminated plans. *PBGC Insurance Data Book 1996, PBGC Single-Employer Program.*

[11]California Employment Law Council claims to represent about sixty private sector employers in the State of California, collectively

was not a claim for benefits, for which State courts have concurrent jurisdiction per §1132(a)(1)(B). Instead, they asserted it was an action to enforce ERISA for which federal district courts have exclusive jurisdiction per §1132(a)(3). MARY asserted her action was indeed a claim for benefits, but since Claimant had retracted its qualified determination she no longer had a QDRO. Whereupon, she said Subp. (J) denied her beneficiary status per §1002(8) and thus standing to sue under any part of §1132. Instead, she asserted her rights under §1144(b)(7). On July 28, 1997, *Oddino II* issued and found it had jurisdiction to find a DRO qualified under §1132(a)(1)(B)[13] and §1132(e)(1). It refused to consider the Legislative History of REA, the effect of Subp. (J), and of §1144(b)(7). *Oddino II* also said that while 26 C.F.R. §1.411(a)-7(c) instructs how to make the "greater of" calculation for finding the Normal Retirement Benefit ("NRB"), §1002(22), the calculation did not require an

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employing in excess of a half million Californians. The Employers Group represents "nearly 5,000 companies of all sizes in every industry, which collectively employ approximately 2.5 million employees."

[12]The extent of the pension withholding practices complained of here is seen in the letters to the California Supreme Court in support of Claimant from the following firms: BHP Minerals ("sponsors plans covering thousands of US employees") September 19, 1996; Food Pension Trust ("Over 100,000 employees and [retirees]"; "ninth largest jointly-administered private pension plan in the United States") September 26, 1996; Hewitt Associates ("over 5,500 consultants and actuaries", "over 70 percent of the Fortune 500 industrial companies" are clients, including Claimant) November 5, 1996; International Business Machines Corp. (reportedly #12 US pension fund worth $39 billion) September 30, 1996; Lockheed Martin Corp. (# 27 at $20.5 billion; "Lockheed Retirement Plan has approximately 86,315 participants") October 24, 1996; Nicholas L. Saakvitne (attorney specialist in pension law) September 20, 1996; Shardlow & Vick (attorneys exclusively in ERISA law) September 19, 1996; and Trucker-Huss (attorneys at law "advising sponsors and administrators of private and governmental retirement plans) September 18, 1996. These friends of Claimant are a small fraction of all defined benefit programs and beneficiaries, but certain to grow to all plans under *Oddino II*.

[13]Unless otherwise stated, all references to a section (§) are to United States Code, Title 29 (Labor), (29 U.S.C. §x).

actuarial adjustment. This was on the theory that "a difference in *commencement time* of annuity payments is not a difference in the form[14] of annuity". Original emphasis, *id.*, p.86, fn. 11.

Based on its interpretation of the definition of NRB, and on its "blue pencil edit" of the definition of accrued benefit, *Oddino II* determined that every ERB contained a subsidy and reversed the Court of Appeal finding that the ERB was an accrued benefit. The California Supreme Court thus sided with the Tenth Circuit in *American Stores*, *supra*, and against the Second Circuit in *Amato*, *supra*.[15]

Next, *Oddino II* declared with no discussion that the Rule of 75 ERB, a benefit provided solely under the terms of the Plan, contained an employer subsidy! It ignored the definitional distinction in ERISA between *plan* at §1002(3) and *employer* at §1002(5). By this ignorance, the Court put this ERB into the class of benefits Subp. (E)(i)(II).excludes from a plan's liability.

The *Oddino II* Court concluded that under Subp. (E)(i)(II) a QDRO could not order a share of a plan's ERB paid before the participant actually retired. This was because of an inferred *quid pro quo*: payment of the ERB for actual retirement. The below Court read the plan amendment case of *Lockheed v. Spink* (1996) __U.S.__, 116 S. Ct. 1783 to find all ERBs necessarily contain this *quid pro quo*. Thus, the California Supreme Court infers Subp. (E) enacted 12 years earlier, is so designed:

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[14]"[A] pension plan is not a qualified plan unless all benefits provided by the plan are definitely determinable" Senate Report No. 98-575, page 27. This requirement is met if the following are known: the amount of each annuity, the start date of payments, and the duration of payments (even if for a life time known only from mortality tables). A reasonable meaning to "form" of a benefit is the application of these three factors. To calculate the value of a benefit requires applying these factors plus actuarial principles. Those principles require set standards for the interest rate and the mortality statistics.

[15]See footnote 6.

> As sponsor of the Plan, Hughes would remain responsible for funding the portion of James's Rule of 75 benefits paid to Mary, while James continued to work and receive salary and other benefits from Hughes. Section 1056(d)(3)(E)(i)(II) appears designed to avoid just such a result. *Oddino II*, p. 88.

Therefore, notwithstanding the explicit, express, and contradicting assumption of actual retirement in ERISA (Subp. (B) ('payable with respect to a participant") and Subp. (E)(i)(II) ("as if the participant had retired")), in California's *Gillmore* rule[16], in the subject Plan[17], and in MARY's QDRO[18], the California Supreme Court, citing *Lockheed v. Spink*, *supra*, concluded that even without amendment, "Such subsidized early retirement programs are a '*quid pro quo* between the plan sponsor and the participant.' (*Id.* at p. __ [135 L.Ed.2d at p. 165].)" All this rationale was to avoid a QDRO formula to pay a percent of a plan's ERB.

Oddino II refused to reconcile its inferred *quid pro quo*, admittedly an unwritten benefit to the employer sponsor, with the ERISA instruction that a plan be administered "solely in the interest of the participants and beneficiaries". §1104(a)(1). It is also impossible to create an unwritten *quid pro quo* if that Court abided §1104(a)(1)(D) that plans be

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16"Under the cases and statutory law, Earl cannot time his retirement to deprive Vera of an equal share of the community's interest in his pension. It is a "settled principle that one spouse cannot, by invoking a condition wholly within his control, defeat the community interest of the other spouse.'" *In re Marriage of Gillmore* (1981) 29 Cal.3d 418, 423 [629 P.2d 1,174 Cal.Rptr. 493]. "[T]he nonemployee spouse ... has the choice as to when his or her share of the pension shall begin." *Id.*, 425.

17"[I]n no event shall a Participant's ... monthly Benefit under [any NRB] be less than the largest [early] monthly Benefit ... to which he could have become entitled at any time by incurring a Separation from the Service." Plan ¶4.2(c). "'Early Retirement Benefit' of a Participant ... means the Benefit payable to or with respect to him under Section 4.8." *Id.*, §1.23.

18"The payments to Petitioner are to be determined as if Respondent had retired on April 1, 1988". MARY's QDRO, §c.

administered only "in accordance with the documents and instruments governing the plan". Finally, the Court below created an actual retirement requirement which the Plan and ERISA (Subp. (B) and Subp. (E)) both contradict by providing the assumption of actual retirement.

Oddino II found MARY's DRO qualified but for a lesser amount. That Court refused her request to perfect the order by restating the formula for amount into fixed dollar terms per Subp. (C)(ii). It also refused to test whether the amount originally ordered was in excess of the Plan's liability, thus causing a cost increase prohibited by Subp. (D)(ii). The below Court ignored the application of §1054(g)(2), refused to consider the conflict it's conclusion created between Subp. (C) and Subp. (E), refused to consider Claimant's failure to pay any segregated amount per Subp. (H), and refused to estop Claimant from paying a lesser benefit than it represented it would pay in its written estimate.

It then denied Mary's request for rehearing on October 15, 1997.

ARGUMENT

With REA, Congress opened the purse of pension benefits earned in ERISA plans to State domestic relations courts. It gave them access to all the benefits participants had accrued on becoming eligible for early retirement, even though they continued to work. It did so by amending ERISA's anti-alienation and supersedure provisions at 1056(d)(3) and §1144(b)(7), respectively.

Congress first took control of all State court orders against pension benefits (anti-alienation) and then created the exemption of the QDRO to provide uniformity for proper assignment orders. Congress then amended ERISA's supersedure clause to make all State law available as was necessary to administer and enforce the orders. Finally, to assure that State and not federal courts would be the forum to

settle all controversies, Congress denied alternate payees access to ERISA's existing civil enforcement procedures and causes of action until after the plan found their orders qualified. Subp. (J).

Congress intended "that plan administrators make every effort to assure that alternate payees receive the benefits which have been awarded them by the State domestic relations courts." The subject Plan has successfully resisted paying the full amount the QDRO here ordered paid and from the date ordered. Plus with DOL's assistance it has prevented recognition that MARY's rights and standing are under State law. *Oddino II* approved these practices. They are obnoxious, in conflict with and overturn the principle purposes of the QDRO.

The California Supreme Court in *Oddino II* determined that the Plan's ERB was a subsidy by falsely relying on fragments of ERISA statutes and Regulations. The U.S. Circuit Courts divided on the question of what was an ERB, an accrued benefit or a subsidy. Those same courts did not disagree, however, that since REA enacted §1054(g)(2), ERBs and subsidies alike are treated as accrued benefits. The Court of Appeals in *Oddino I* agreed, holding that the ERB was an accrued benefit, not a subsidy. The Court of Appeals also ruled that the plan was to pay the full amount from the date ordered in the QDRO, that is, the segregated amount under Subp. (H). The California Supreme Court reversed, holding that the Plan's ERB was an employer subsidy and could not be referenced in the formula for the amount the QDRO orders paid. Thus the *Oddino II* Court denied alternate payees their right to share in ERBs, refused to treat the ERB as an accrued benefit as §1054(g)(2) would require, and as well refused to award the segregated amount.

In making its order, *Oddino II* included the following findings and determinations, all of which involve important open questions of federal law which the Supreme Court of the United States should settle:

1. California falsely interpreted and ignored the separate integrity of Subp. (E) to infer additional requirements for what cannot be in a QDRO where ERISA has spoken at Subp. (D).[19]

2. *Oddino II* converts Subp. (E)(i)(II) from being the measure of maximum plan liability (its cost) to being another restriction on the formula for the amount payable. *Oddino II* thus removes the standard which Subp. (D)(ii) applies to determine whether the QDRO orders an amount that causes a prohibited cost increase, an amount in excess of the plan's maximum liability.

3. Without discussion, *Oddino II* found there was an employer subsidy in every ERB, even if such a benefit is only defined in and payable from a plan. Ignored is the separate integrity and definitions of plan (§1002(3)) and employer (§1002(5)).

4. *Oddino II* further ignored the contradicting examples in the Treasury Regulations and Legislative History to find every ERB necessarily contained a subsidy. In defense of this conclusion it simply said that the definition of subsidy from the Legislative History when applied to the NRB definition at §1002(22) created circularity. Otherwise the result of the application of ERISA definitions contradicted its belief that every ERB contains a subsidy.

5. ERISA expresses the definition of accrued benefit under the Act in terms of the accrued benefit under the plan, and if the latter accrued benefit is expressed as a benefit beginning at an early age (an ERB) it must be actuarially

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[19]That is, Subp. (E) states what a plan cannot say (or do). Subp. (E) reaches the QDRO only through Subp. (D)(i) where ERISA prohibits a QDRO from not complying with certain provisions in the plan. Subp. (E) is permissive with respect to QDROs. It admits a larger class of DROs than Subp. (C) and Subp. (D) otherwise permit. *Oddino II* ignored the structure of Subp. (E) and misunderstood its provisions to create a smaller class of permissible DROs. These structural considerations are sufficient to defeat the California Supreme Court ruling, independent of the substantive provisions in Subp. (E).

increased to the normal retirement age. §1002(23). *Oddino II* construed §1002(23) to mean the accrued benefit under the plan is a benefit which must begin at normal retirement age. This ignores that 26 C.F.R. §1.411(a)-7(a) expressly includes any ERB in the accrued benefit under the Act.

6. Contrary to the definition of normal retirement benefit at §1002(22), *Oddino II* said the selection of the greater of the ERB or NRAB does not require converting the ERB to an age 65 benefit. Plus, *Oddino II* says 26 C.F.R. §1.411(a)-7(c), although so instructing, does not require the conversion be based on actuarial principles. Per that opinion, neither the statute nor the Regulation applied because "a difference in commencement time of annuity payments is not a difference in the form of annuity." *Id.*, p. 86, fn. 11.

7. Further ignored below was that ERISA requires ERBs and subsidies be treated as accrued benefits per §1054(g)(2), and that a plan may not put in practice any act not permitted under the terms of the plan (§1104(a)(1)(D)).

8. By inferring a *quid pro quo* payment only in exchange for actual retirement, *Oddino II* contradicts the assumption of actual retirement which Subp. (B) and Subp. (E) supply. The inference of a *quid pro quo* benefits the employer, and if not reversed, *Oddino II* r[illegible]ks the explicit proscription of §1104(a)(1) that a plan may be administered only on behalf of participants and be[illegible]ciaries; and the further proscription of §1104(a)(1)(D) that a plan may not practice any act not permitted in its written terms. Finally, the below Court relied on an overbroad reading of *Lockheed v. Spink, supra.* That authority approved a plan amendment, not an unwritten *quid pro quo* plan practice.

9. Ignored further is the Subp. (H) provisions for computing and paying the segregated amount to alternate payees (including MARY). *Oddino II* simply reversed the lower court order that it be paid.

10. Ignored too are both that Subp. (J) denies MARY access to ERISA civil enforcement procedures and causes of

actions (§1132), and that State law applies instead under §1144(b)(7).

The trial court, the Court of Appeal and the Supreme Court of California provided differing results and three different opinions. The Circuit Courts of Appeals are also in conflict regarding issues involved in MARY's case. Evident is one or more elements of confusion and uncertainty regarding the purpose and meaning of ERISA.

The Supreme Court of the United States has not previously taken a matter relating to the amount and timing of benefits assigned in a QDRO, the anti-alienation question. In *Mackey v. Lanier Collection Agency & Serv.* (1988) 486 U.S. 825, this Court did consider the meaning of the QDRO exception to supersedure at §1144(b)(7) as it might provide insight into congressional intent underlying the general supersedure clause at §1144(a). That opinion held that the supersedure clause related to benefit plans, while the anti-alienation provision related to pension benefits.

Mackey struggled to solve an apparent problem with the two ERISA preemptions, anti-alienation and supersedure. How could §1144(b)(7) save only QDROs from supersedure when those orders alienate pension benefits but supersedure at §1144(a) applies to plans as a whole and not to benefits? The opinion suggested alternative interpretations for §1144(b)(7) to leave the problem unsettled, but the issue fueled the dissent. It believed that only the QDRO itself was saved, which would be surplusage under the ruling that supersedure applied to plans, and not to pension benefits.

The litigation below of this QDRO matter reveals that the QDRO savings clause saves not QDROs, but State law relating to QDROs. Congress explicitly expressed this intent in Senate Report No. 98-575 and House Report 98-655, Part I, Retirement Equity Act of 1984, 98th Cong., 2d Sess. See Appendix G, page App.63.

Here Mary has shown that §1144(b)(7) does not mean, "Supersedure shall not apply to QDROs", but instead it means "Supersedure shall not apply to State law relating to

QDROs." The California Supreme Court refused to consider this statute that provides it jurisdiction and Mary standing to sue. Instead it ruled correctly that it had concurrent jurisdiction under §1132(a)(1)(B), which was never in doubt, but refused to consider that Mary had no standing at all.

Congress recognized that this problem of standing had split federal courts and with REA expressly solved it. *Francis v. United Technologies* (1978) 458 F.Supp. 84 held that an alternate payee, as she is now known, was neither a participant nor a beneficiary. It said ERISA explicitly defined those terms, and the alternate payee there did not satisfy any of the definitions. On the other hand, *Stone v. Stone* (9th Cir.1980) 632 F.2d 740 held that the alternate payee in that case was in effect a participant for the purposes of §1132(a). The 98th Congress settled the matter. It denied alternate payees standing under federal law, that is until after the plan found their orders qualified. Instead Congress gave the alternate payees standing in their State courts to settle all disputes. The Legislative History to REA expressly attributes this result and the solution to the standing problem to REA's amendment to supersedure. That amendment, the so-called QDRO savings clause, is §1144(b)(7).

In *Mead Corp. v. Tilley* (1989) 490 U.S. 714 this Court found the question of whether ERBs were accrued benefits too important to decide without a full briefing. "Without the views of the agencies responsible for enforcing ERISA or an opinion by the Court of Appeals, we are reluctant to address these complicated and important issues pertaining to the private pensions of millions of workers." *Id.*, p. 727. Here, the issue can now be settled on three grounds. As a matter of law, the definition of accrued benefit in ERISA not only does not reject ERBs, but actually embraces them. Also as a matter of statutory definition, read with the Legislative History and confirmed by judicial opinions, no part of any earned ERB under a plan can contain a subsidy in any part. Moreover, by statute ERBs must be treated as accrued benefits. §1054(g)(2).

Conclusion

This case is important because the opinion below threatens each of the principles REA enacted for QDROs. Examples of those principles effected in §1144(b)(7) and Subp. (B) include: (1) State, not federal, courts are the forum to settle all issues, (2) State, not federal, substantive and procedural law apply to enforce QDROs, and (3) an alternate payee may be paid as much as 100% of a participant's ERB once earned. See emphasized excerpts from REA Legislative History, Appendix G, page App.63.

This Court previously addressed Congressional intent in enacting the ERISA supersedure clause, debating without deciding the meaning of the QDRO exception. *Mackey v. Lanier Collection Agency & Serv., supra.* Now for this Court's consideration are the QDRO implementing statutes that regulate both the amount and timing of benefits. Petitioner's case provides conflicting decisions below and between U.S. Circuit Courts of Appeals regarding the meaning and application of ERISA sufficient to settle both the important federal questions of QDRO enforcement, one as to the amount and the other as to the timing of benefits.

Whether the §1054(g)(2) treatment of early retirement benefits and subsidies as accrued benefits is avoidable by practice when prohibited by plan amendment is a further subsidiary question. This and the other subsidiary questions require interpretation of the ERISA history, statutes and its Regulations, including definitions of subsidy, accrued benefit, normal retirement benefit, plan and employer.. Applicable also are federal rules of statutory interpretation (whether provisions are made redundant, if words can be ignored, and where do provisions apply) to the settling of these important questions.

The primary purpose of REA was to provide alternate payees such as MARY the right to the pension purse earned during marriage, separate from the whims of plans and participant ex-spouses. It also sought to protect those pension

benefits from delay, and the risk of loss on account of the actions or death of participants.

The practices of the Claimant are obnoxious to the purposes of ERISA as amended by REA, and in conflict with the intent of Congress expressed in the Act. Without intervention and explication from this Court, the MARYs will not have the protection and rights Congress provided, but will continue to suffer the risk of pension plan administration withholding, delaying, or even destroying their marital pension property.

Therefore Petitioner respectfully prays this Honorable Court grant her Petition for writ of certiorari.

DATED: January 12, 1988

Respectfully submitted,

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APPENDIX A:
ODDINO II

IN RE MARRIAGE OF ODDINO (1997)
16 CAL.4th 67, ___CAL.RPTR.2d___

[NO. S055819. JUL 28, 1997.]

In re the Marriage of MARY K. and JAMES M. ODDINO. MARY K. ODDINO, Appellant, v. JAMES M. ODDINO, Respondent; HUGHES AIRCRAFT COMPANY NON-BARGAINING RETIREMENT PLAN, Respondent.

[*In re Marriage of Oddino* 16 Cal.4th 67, page 71]

Glasser and Smith and Robert Glasser for Appellant.

No appearance for Respondent James M. Oddino.

O'Melveny & Myers, Stephen J. Pepe, Wayne S. Jacobsen, Todd R. Wulffson and Larry A. Walraven for Respondent Hughes Non-Bargaining Retirement Plan.

Thomas S. Williamson, Jr., J. Davitt McAteer, Marc I. Machiz, Daniel W. Teehan, Paula J. Page, Theresa Gee, Karen L. Handorf, Barbara A. Matthews, Bettina Redway, Paul, Hastings, Janofsky & Walker, Ethan Lipsig, Proskauer, Rose, Goetz & Mendelsohn and Jeffrey A. Berman as Amici Curiae on behalf of Respondent Hughes Non-Bargaining Retirement Plan.

MAJORITY:

WERDEGAR, J.—

Under provisions of the federal Employee Retirement Income Security Act of 1974 (29 U.S.C. §1001 et seq.; hereafter ERISA), private retirement plans may, pursuant to a state court's domestic relations order, pay a portion of an employee participant's retirement benefits directly to the employee's former spouse or dependents, if and only if the state court order meets certain specifications. Such an order

is a "qualified domestic relations order" (hereafter a QDRO). (29 U.S.C. §1056(d)(3).)[1]

In this case, we address two questions relating to ERISA and the division of private retirement benefits in a marital dissolution action. First, do the California courts have subject matter jurisdiction to decide whether a superior court's order assigning retirement benefits to the nonemployee spouse is a QDRO? Our answer is yes: state and federal courts have concurrent jurisdiction over that question under section 1132(e)(1). Second, does an order qualify as a QDRO if it requires the retirement plan to pay the nonemployee spouse a portion of the employee spouse's early retirement benefits without any actuarial reduction, where the employee spouse is eligible for such unreduced benefits upon early retirement but has not yet retired? We answer this question no: Such unreduced early retirement benefits include an employer subsidy for early retirement, which, under section 1056(d)(3)(E)(i)(II), may not be paid pursuant to a QDRO if the employee spouse has not separated from service.

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Factual and Procedural Background

The marriage of Mary K. and James M. Oddino was dissolved by the superior court in an interlocutory judgment filed January 19, 1983. During the marriage, James was employed by the Hughes Aircraft Company (Hughes) and participated in the Hughes Aircraft Company Non-Bargaining Retirement Plan (the Plan), which is administered by Hughes. In the interlocutory judgment, Mary was awarded "that portion of [James's] retirement benefits payable, upon date of retirement, pursuant to the formula in Brown." [2] On March 24, 1989, pursuant to a stipulation by James and

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[1]All further statutory references are to title 29 of the United States Code, unless otherwise specified.

[2]The court's reference was apparently to In re Marriage of Brown (1976) 15 Cal.3d 838 [126 Cal.Rptr. 633, 544 P.2d 561, 94 A.L.R.3d 164]. (See In re Marriage of Judd (1977) 68 Cal.App.3d 515, 522 [137 Cal.Rptr. 318].)

Mary, the court modified its judgment by determining more exactly Mary's share of the retirement benefits (36.6231 percent) and specifying that payments to Mary were to be determined "as if [James] had retired on April 1, 1988," and were to begin "as of" April 1, 1988, or as soon as practical thereafter. April 1, 1988, was James's 55th birthday. At the time of this order, James was still working at Hughes.

On June 1, 1989, the Plan's administrator informed Mary and James the superior court order was a QDRO. The administrator noted, however, that the Plan interpreted the order as not mandating that payments to Mary include "the 'early retirement subsidy.' " In calculating the benefit to be paid Mary, the Plan reduced the monthly annuity amount, which was based on the annuity payable to James on retirement at age 65, by a factor of .4322. This reduction was to account for the fact monthly payments to Mary would begin before James's 65th birthday and would be paid for a longer period. The calculated benefit was, according to the Plan, "equal in actuarial value" to a benefit paid beginning on James's 65th birthday. The actuarial factor reduced Mary's payments, under the 60-month payout option she chose, from $3,618 to $1,564 per month. The Plan began making payments to Mary at the reduced rate in early 1990.

Under the terms of the Plan, an employee who retires at or after age 55, and the sum of whose age and years of service is at least 75, is entitled to a benefit calculated without actuarial reduction, i.e., an annuity in the same periodic amount as if he or she had retired at age 65. This is known as the "Rule of 75." An employee who retires before age 55, or an employee who retires between the ages of 55 and 65 and whose age and years of employment do not total at least 75, is entitled only to an early retirement benefit reduced to the actuarial equivalent of the age 65 benefit. Had James retired on or after April 1, 1988, he would have been entitled to full benefits under the Rule of 75.

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In March 1990, dissatisfied with the actuarially reduced payments, Mary joined the Plan in the marital dissolution action (see Fam. Code, §2060) and sought an order requiring the Plan to pay her benefits calculated under the Rule of 75. The Plan opposed such an order on the ground it would not be a QDRO, and the Plan would therefore be forbidden under ERISA from making any payments to Mary under it.

The superior court denied the relief Mary requested, finding that the Rule of 75 "constitutes a subsidy rather than an accrued benefit," and is therefore "not payable to a spouse prior to the actual retirement of the working spouse." The Court of Appeal reversed and directed the superior court to order the Plan to pay Mary benefits under the Rule of 75. The appellate court held the Rule of 75 was not an employer subsidy, but was instead "the normal retirement benefit when the criteria of 75 years are met." For that reason, the court held, the superior court order would remain a QDRO even if construed to require the payment of unreduced benefits. We granted the Plan's petition for review.

Discussion

I. Subject Matter Jurisdiction

The Plan contends the Court of Appeal was without jurisdiction to decide that the superior court order of March 1989, interpreted as requiring payment of Rule of 75 benefits to Mary before James's retirement, is a QDRO. The Plan's contention is based on its broader claim, endorsed as well by amicus curiae the United States Department of Labor (DOL), that federal courts have exclusive jurisdiction over the question whether a state court domestic relations order is "qualified" under ERISA.

The question of state court subject matter jurisdiction was not raised by the parties in either of the lower courts and was not addressed by the Court of Appeal; the Plan objected on jurisdictional grounds for the first time in its petition for review. As a matter of fundamental jurisdiction affecting the power of the lower courts to act, however, the issue must be addressed. (Consolidated Theatres, Inc. v. Theatrical Stage

Employees Union (1968) 69 Cal.2d 713, 721 [73 Cal.Rptr. 213, 447 P.2d 325].)

We may properly address the question in the general form in which the parties discuss it: Does a state court have jurisdiction to determine that a domestic relations order is "qualified" under ERISA? Although neither the superior court nor the Court of Appeal directly ordered the Plan administrator to consider the March 1989 order a QDRO when construed as mandating

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payment under the Rule of 75, such a result was implicit in the Court of Appeal's direction that the administrator be ordered to pay Mary the Rule of 75 benefits. As the Court of Appeal recognized, the administrator could not, under the applicable provision of ERISA (§1056(d)(3)(A)), legally pay such benefits except pursuant to a QDRO. The Court of Appeal's command that the superior court order Mary to be paid Rule of 75 benefits was thus necessarily premised on the court's holding that such an order would be a QDRO.

The dispute over subject matter jurisdiction centers on a provision of ERISA giving the federal courts exclusive jurisdiction over some ERISA-related actions and giving state courts jurisdiction, concurrent with that of the federal courts, over others. Section 1132(e)(1) states a general rule of exclusive federal jurisdiction for actions brought under ERISA and provides a single possibly applicable exception—"actions under subsection (a)(1)(B) of this section"—as to which state and federal courts have concurrent jurisdiction.[3] Section 1132(a)(1)(B), in turn, authorizes actions by a retirement plan participant or beneficiary "to recover benefits

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[3]Section 1132(e)(1) provides in full: "Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section."

due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." Subsection (a)(3) of the same section authorizes participants and beneficiaries to bring civil actions to enjoin violations of ERISA or of the plan's terms, to obtain other equitable relief or redress for such violations, or to enforce provisions of ERISA or the plan.[4]

Mary contends her request for relief against the Plan was in the nature of an action to recover benefits due her under the terms of the plan—specifically, benefits calculated pursuant to the plan's Rule of 75—and to clarify her right to such future benefits. It was therefore brought, Mary argues, under section 1132(a)(1)(B), and thus was the subject of concurrent state-federal jurisdiction under section 1132(e)(1). Mary relies on the only published decisions directly addressing this question, both of which arose out of

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the same disputed marital property order and both of which were decided in favor of concurrent state jurisdiction. (*In re Marriage of Levingston* (1993) 12 Cal.App.4th 1303 [16 Cal.Rptr.2d 100] (Levingston I); *Board of Tr. of Laborers Pension Tr. v. Levingston* (N.D.Cal. 1993) 816 F.Supp. 1496 (Levingston II).) On the other hand, the Plan, supported by DOL, maintains Mary is seeking to enforce a provision of ERISA, to wit, the section requiring a plan administrator to determine if an order is a QDRO; her action therefore is

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[4]Section 1132(a) provides, in pertinent part: "A civil action may be brought—(1) by a participant or beneficiary—[¶] (A) for the relief provided for in subsection (c) of this section, or [¶] (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; [¶] (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title; [¶] (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provisions of this subchapter or the terms of the plan; ..."

brought pursuant to section 1132(a)(3) and is exclusively within the jurisdiction of the federal courts under section 1132(e)(1). The Plan does not cite any case authority directly supporting its position, but argues both Levingston decisions are contrary to the text and intent of ERISA.

Some background on ERISA's QDRO provisions will be helpful to our discussion. As originally enacted in 1974, ERISA was silent on the question whether its preemption (§1144) and anti-alienation (§1056(d)) provisions prevented state courts from assigning portions of an employee spouse's retirement benefits to a nonemployee spouse pursuant to state law on division of marital property or obligations of support. Courts generally held such orders were not preempted and did not violate the anti-alienation provision. (See, e.g., Carpenters Pension Trust, etc. v. Kronschnabel (9th Cir. 1980) 632 F.2d 745, 747-749; In re Marriage of Johnston (1978) 85 Cal.App.3d 900, 910-912 [149 Cal.Rptr. 798]; Evans v. Evans (1993) 111 N.C.App. 792 [434 S.E.2d 856, 859] [citing cases].) In 1984, however, Congress acted to eliminate any uncertainty by spelling out the types of state court domestic relations orders plan administrators may honor. The 1984 ERISA amendments, also known as the Retirement Equity Act (REA), defined QDRO's (§1056(d)(3)(B)(i)) and exempted such orders from the preemption and anti-alienation provisions (§§1144(b)(7), 1056(d)(3)(A)). In addition, Congress gave the status of plan beneficiaries to former spouses and dependents of plan participants who have received, in a QDRO, rights to any of the participant's benefits ("alternate payees" as defined in §1056(K)), thus allowing them to enforce their rights to benefits. (§1056(J).)

Through these and other provisions, Congress sought to protect the rights of nonemployee spouses and dependents by allowing state courts to make equitable divisions of property in a divorce or dissolution and provision for support of dependents. (*Boggs v. Boggs* (1997) -- U.S. -- [117 S.Ct. 1754, 138 L.Ed.2d 45]; *In re Marriage of Baker* (1988) 204

Cal.App.3d 206, 216-217 [251 Cal.Rptr. 126]; H.R.Rep. No. 655, 98th Cong., 2d Sess., p. 25 (1984) [REA's primary goals include providing "adequate safeguards for spouses not employed outside the home"]; Sen.Rep. No. 575, 98th Cong., 2d Sess., p. 1 (1984), reprinted in 1984 U.S. Code Cong. & Admin. News, p. 2547 (hereafter the 1984 Senate Report) [REA will amend ERISA to

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account for "the status of marriage as an economic partnership, and the substantial contribution to that partnership of spouses who work both in and outside the home"].)

Under section 1056(d)(3)(G)(i), the plan administrator makes the initial determination whether a domestic relations order received by the plan is a QDRO. REA contemplates possible judicial review of that determination in "a court of competent jurisdiction" (§1056(d)(3)(H)(i)), but does not specify the procedure for obtaining such review or the court or courts having jurisdiction. Hence, the parties have turned, as we must also, to the original ERISA provision on jurisdiction, section 1132(e)(1). As already explained, under that provision the existence of state jurisdiction depends upon whether an action to require payments, pursuant to a domestic relations order of disputed qualification, is properly considered an action by a beneficiary to recover, enforce rights to, or clarify future benefits under the terms of a plan, within the meaning of section 1132(a)(1)(B).

In Levingston I, the Court of Appeal held a nonemployee spouse seeking an order that a plan pay benefits as set out in a disputed QDRO was pursuing an action under section 1132(a)(1)(B), within the jurisdiction of the superior court that issued the disputed QDRO. In seeking a payout in the form of an annuity for her own life, rather than a joint and survivor benefit based on the life of her former husband and his new wife, the former wife sought "clearly to recover benefits she claims are due her, to enforce her rights and to

clarify her rights to future benefits." (Levingston I, supra, 12 Cal.App.4th at p. 1306.)

In addition to the language of section 1132(a)(1)(B), the Levingston I court relied on the congressional purpose in REA, i.e., to protect the retirement benefit rights of nonemployee spouses and to provide a practical means by which those benefits could be recovered. "There already is a state court action, the marital dissolution action, to which the plan is a party. Thus, a motion in that court is simple, inexpensive and expeditious. We do not believe Congress, having given state courts the power to issue orders determining and dividing marital rights in retirement plans, would require a separate federal court proceeding to decide whether or not the order is a QDRO. This would cause undue hardship, expense and delay to the affected party, and impose an unnecessary workload on already overburdened federal courts." (Levingston I, supra, 12 Cal.App.4th at p. 1306.)

The Plan attacks the decision in Levingston I on two related grounds. First, the Plan argues, the court's assertion the nonemployee spouse is seeking "to recover benefits" ignores the precise language of section 1132(a)(1)(B),

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which refers specifically to an action to recover benefits, enforce rights, or clarify future benefits "under the terms of the plan." (Italics added.) The Plan reasons that because determination of QDRO status depends on interpretation of ERISA's QDRO provisions, a nonemployee spouse seeking such a determination is asking for enforcement of ERISA, rather than the payment of benefits due "under the terms of the plan." Second, the Plan relies on legislative history from the 1974 enactment of ERISA demonstrating, in the Plan's view, that actions under section 1132(a)(1)(B) were not expected to involve the interpretation of ERISA's substantive provisions.

Considering first the linguistic point, we disagree with the Plan's assertion that Mary and other nonemployee

spouses in like circumstances are seeking to enforce ERISA rather than to obtain benefits under the terms of retirement plans. The superior court's interlocutory judgment divided the community property by giving Mary a specified share of the retirement benefits James had earned through his employment at Hughes. Those benefits are, of necessity, benefits due under the terms of the Plan, which is the only source of retirement benefits to James. The Plan, by its terms, authorizes the payment of part of a participant's benefits to an alternate payee pursuant to a QDRO. A state court domestic relations order, moreover, can be a QDRO only if it does not require a plan to pay "increased benefits (determined on the basis of actuarial value)" or "any type or form of benefit" other than those available under the plan. (§1056(d)(3)(D).) Thus Mary may not claim that she is entitled to greater benefits under any part of ERISA, including the QDRO provisions, than were provided to her and James under the terms of the Plan.

Nor can Mary be said to seek benefits through enforcement of ERISA under section 1132(a)(3). The QDRO provisions added to ERISA by REA do not independently provide former spouses or dependents with rights to any retirement benefits. Rather, they constitute only an exception to the general anti-alienation rule of section 1056(d)(1), allowing plan administrators to make payments, under specified circumstances, to alternate payees if ordered to do so by a state court. To the extent former spouses and dependents have rights in a participant's retirement benefits, those rights derive not from ERISA, but from state domestic relations law. Thus, a former spouse like Mary, who seeks enforcement of a state court order giving her a right to a portion of the participant's plan benefits, is not seeking to enforce ERISA, but to obtain benefits she claims are due her under the terms of the plan and the state court order.

The Plan's legislative history argument rests on a congressional conference report from the 1974 enactment of ERISA. (H.R. Conf. Rep. No. 1280,

93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Admin. News, p. 5038 (hereafter the 1974 Conference Report).) Discussing the provisions that became sections 1132(a) and 1132(e), the 1974 Conference Report states: "The U.S. district courts are to have exclusive jurisdiction with respect to actions involving breach of fiduciary responsibility as well as exclusive jurisdiction over other actions to enforce or clarify benefit rights provided under title I. However, with respect to suits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of the title I provisions, they may be brought not only in U.S. district courts but also in State courts of competent jurisdiction." (1974 Conf. Rep., supra, 1974 U.S. Code Cong. & Admin. News at p. 5107.) The Plan observes that section 1056, the part of ERISA in which REA placed the QDRO provisions, is in title I of ERISA;[5] determining whether an order is a QDRO, therefore, requires a court to apply and interpret the provisions of title I. The 1974 Conference Report, the Plan argues, shows Congress intended to reserve such interpretive authority to the federal courts.

In Levingston II, the federal district court agreed with the Levingston I court that the state courts had jurisdiction to determine the disputed order in that case was a QDRO. The Levingston II court considered the 1974 Conference Report and found it "interesting," but "not dispositive." (Levingston II, supra, 816 F.Supp. at p. 1499.) "First, the Conference Report pre-dates the enactment of the QDRO-related provisions by ten years. See ... Hadden v. Bowen, 851 F.2d 1266, 1268 (10th Cir. 1988) (little weight given to legislative history 'that is not contemporaneous with the language' at issue). Simply because Congress implemented the QDRO

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[5]Title I of ERISA was codified to subchapter I of chapter 18 of title 29 of the United States Code. (See 29 U.S.C.A. (1985) §1002, Historical Note, References in Text, p. 71.)

provisions by creating an amendment to §1056 does not mean that Congress intended QDRO related issues to be treated in the same manner as other title I provisions for jurisdictional purposes.... [¶] Moreover, the Conference Report does not mesh with the plain language of §1132(a)(1)(B). §1132(e)(1) provides concurrent jurisdiction for all actions under that section, and nothing in §1132(a)(1)(B) limits its scope to actions which do not require the application of title I provisions. By its own terms, §1132(a)(1)(B) broadly covers any action to recover, enforce, or clarify benefits, without regard to which ERISA provisions must be applied during the action." (Levingston II, supra, 816 F.Supp. at pp. 1499-1500.)

We find the analysis in Levingston II persuasive. Despite the 1974 Conference Report, Congress did not in ERISA limit state court jurisdiction to actions in which the provisions of title I of ERISA have no application. Instead, Congress extended concurrent state jurisdiction to any action by a

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participant or beneficiary to obtain or clarify benefits under the terms of a plan. As we have already seen, an action to qualify a domestic relations order and obtain benefits pursuant to it is an action to obtain or clarify benefits claimed under the terms of a plan. While Congress clearly intended that actions to enforce rights created by ERISA's title I would be limited to federal courts, rights to benefits awarded in a QDRO are not derived from ERISA, but from state law and plan terms.

ERISA title I, sections 1001 through 1145, contain most of the law's substantive provisions protecting employee retirement benefits. These include duties of reporting and disclosure placed on plan administrators (§§1021-1031), minimum standards of participation, vesting and funding for plans (§§1051-1086), and the duties of plan fiduciaries (§§1101-1114). Under section 1132(e)(1), jurisdiction to

enforce these provisions or impose liability for their violation is exclusively federal. For example, jurisdiction is exclusively federal in an action against a plan administrator for failure to furnish certain information to a participant as required by section 1024 (Duffy v. Brannen (Vt. 1987) 529 A.2d 643, 649) and in an action against an employer alleging termination for the purpose of interfering with benefits, in violation of section 1140 (Summers v. U.S. Tobacco Co. (1991) 214 Ill.App.3d 878 [158 Ill.Dec. 412, 574 N.E.2d 206, 210-211]).[6] Again, however, Mary does not seek to enforce any such ERISA title I provisions against the Plan; she seeks payment of benefits assertedly due her under the Plan and the superior court's division of marital property. A provision of ERISA, section 1056(d)(3)(A), assertedly permits the Plan to pay her such benefits, but is not itself the source of Mary's rights, if any, to such benefits.

Determination of Mary's right to benefits, it is true, requires interpretation of ERISA's QDRO provisions, because those provisions limit the benefits the Plan may pay Mary under a state court order. In that sense, Mary's right to benefits could be said to depend on three sources: the terms of the Plan, the terms of the superior court order, and the terms of ERISA. But the terms of ERISA come into play only as limits on Mary's rights, not as their source. Mary's claim for benefits, therefore, is not an action to enforce ERISA under section 1132(a)(3).

The Plan further argues exclusive federal jurisdiction is necessary to allow development of a consistent "federal common law of rights and obligations

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[6] Jurisdiction is also exclusively federal when the action is brought by someone other than a participant or beneficiary, because section 1132(a)(1)(B) refers only to such plaintiffs. That is the holding—irrelevant here—of two decisions cited by DOL as supporting its jurisdictional contention. (Copeland v. Slidel Memorial Hosp. (La. 1995) 657 So.2d 1292, 1301-1302; Funk Mfg. Co. v. Franklin (Kan. 1996) 927 P.2d 944, 947-948.)

under ERISA-regulated plans" (Pilot Life Ins. Co. v. Dedeaux (1987) 481 U.S. 41, 56 [107 S.Ct. 1549, 1558, 95 L.Ed.2d 39]), as Congress intended. We disagree."Congress's choice to vest jurisdiction over one class of ERISA civil actions in both the state and federal courts is in no way inconsistent with its intent to create a comprehensive scheme of federal common law in the area. State as well as federal courts may be expositors of federal law." (Menhorn v. Firestone Tire & Rubber Co. (9th Cir. 1983) 738 F.2d 1496, 1500, fn. 2.) Although Congress may have expected that state courts typically would resolve section 1132(a)(1)(B) actions through application of "general principles of contract law" (738 F.2d at p. 1500, fn. 2), the rule of federal exclusivity cannot be so broad as to exclude all state court participation in the development of ERISA law. Every action brought by a participant or beneficiary under section 1132(a)(1)(B), even if it purports to state causes of action under state law, is deemed to arise under, and to be governed solely by, federal law, i.e., ERISA and its common law outgrowths (Metropolitan Life Ins. Co. v. Taylor (1987) 481 U.S. 58, 62-66 [107 S.Ct. 1542, 1545-1548, 95 L.Ed.2d 55]), yet Congress expressly permitted such actions to be brought in state court.

Finally, whatever inferences may be drawn from the 1974 legislative history, we agree with both Levingston courts that Congress, when it amended ERISA through REA in 1984, did not intend to strip state courts of the power to enforce QDRO's against plan administrators. (See Levingston I, supra, 12 Cal.App.4th at pp. 1306-1307; Levingston II, supra, 816 F.Supp. at p. 1500.) Even before the passage of REA, an action by a beneficiary to obtain benefits awarded in a state domestic relations order was held to come within section 1132(a)(1)(B), giving concurrent jurisdiction to state and federal courts. (Stone v. Stone (9th Cir. 1980) 632 F.2d 740, 742-743; General Dynamics Corp. v. Harris (Tex.Ct.App. 1979) 581 S.W.2d 300, 303-304; In re Marriage of Pilatti (1979) 96 Cal.App.3d 63, 65-68 [157

Cal.Rptr. 594].) REA, of course, confirmed that a state court's division of retirement benefits and assignment of such benefits to a former spouse or dependent was not preempted or precluded by ERISA. It seems highly unlikely Congress, acting to protect the rights of former spouses and dependents as adjudicated in state court, would, at the same time, have deprived them of their existing ability to obtain enforcement of those rights in state court and required them instead to initiate a separate lawsuit in federal court whenever a retirement plan disputed the qualified status of the state court order.

Because federal courts cannot themselves issue or modify domestic relations orders (see, e.g., Hunter v. Ameritech (N.D.Ill. 1991) 779 F.Supp. 419,

[*In re Marriage of Oddino* 16 Cal.4th 67, page 81]
421; Dickerson v. Dickerson (E.D.Tenn. 1992) 803 F.Supp. 127, 134), separate litigation of the QDRO issue in federal court presents the potential for an expensive and time-consuming course of parallel litigation, including possible appeals, in the two court systems. Few of the former spouses and dependents whose interests REA was intended to protect could afford such expense or delay in determination of their income. Indeed, as the principal House sponsor of REA explained, the legislation was intended to clarify the law in the hope of reducing the need for extended litigation, for "no one benefits when a participant's or beneficiary's rights or a plan's obligations are so unclear that costly and protracted litigation is the inevitable result of lack of statutory clarity." (Remarks of Rep. Clay, Debate on H.R. 4280, 98th Cong., 2d Sess. (1984) reprinted in ERISA: Selected Legislative History 1974-1985 (Bur. Nat. Affairs 1986) p. 252 (hereafter BNA Legislative History).) In the absence of explicit direction in the law, we will not presume Congress intended to deprive alternate payees of their remedy in state court.

At oral argument, counsel for DOL suggested that were we to hold Mary's action comes under section 1132(a)(1)(B),

allowing concurrent jurisdiction, we would actually make it harder for other similarly situated alternate payees to obtain disputed benefits. That result would follow, according to DOL, because, under Firestone Tire & Rubber Co. v. Bruch (1989) 489 U.S. 101 [109 S.Ct. 948, 103 L.Ed.2d 80] (Firestone), courts in section 1132(a)(1)(B) actions must apply a deferential standard of review to plan administrators' decisions. Even if relevant to the jurisdictional question, which we doubt, DOL's argument that state courts would have limited authority to review decisions of plan administrators is not well taken. Firestone actually holds that "a denial of benefits challenged under §1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." (Firestone, supra, 489 U.S. at p. 115 [109 S.Ct. at pp. 956-957].) Although the Plan does give Hughes the authority to interpret the Plan's terms, it gives Hughes no discretionary authority to determine whether a state court order is a QDRO as defined in ERISA or as defined in the Plan (which merely incorporates ERISA's definition). The determination that an order is not a QDRO is therefore, under Firestone, reviewed de novo.

For the reasons given, we conclude state courts have subject matter jurisdiction, concurrent with that of the federal courts, over whether a domestic relations order is a QDRO as defined in ERISA, section

[*In re Marriage of Oddino* 16 Cal.4th 67, page 82]
1056(d)(3)(B). The Court of Appeal therefore did not err by deciding that substantive question.[7]

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[7]DOL urges us to hold that, even if state courts have jurisdiction, the California statutory provisions for joining retirement plans as parties in dissolution actions are invalid because they are preempted by ERISA; any state court action to determine QDRO status, DOL argues, would have to be separate from the marital dissolution action. We do not ordinarily consider questions not raised by the appellate record and put forward only by an amicus curiae (E.L. White, Inc. v. City of Huntington Beach (1978) 21 Cal.3d 497, 510-511 [146

II. Payment of Benefits Under the Rule of 75

Under California law, a nonemployee spouse may be entitled to begin receiving his or her community interest in an employee spouse's retirement benefits prior to the employee spouse's actual retirement. (In re Marriage of Gillmore (1981) 29 Cal.3d 418, 422-429 [174 Cal.Rptr. 493, 629 P.2d 1].)[8] In the 1984 REA amendments to ERISA, Congress recognized that state domestic relations orders might call for such preretirement payments to an alternate payee. REA provides that an order may be a QDRO even if it requires preretirement payment on or after the participant's earliest retirement age and "as if the participant had retired on the date on which such payment is to begin under such order (but taking into account only the present value of benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement)." (§1056(d)(3)(E)(i)(II), italics added.)[9]

Cal.Rptr. 614, 579 P.2d 505]), and we see no reason to depart from that policy here. The Plan has never objected to participating in the dissolution action and has refrained from claiming ERISA preemption of California joinder statutes even after DOL put this theory forward in the Court of Appeal. DOL's theory has, as well, been previously rejected by California courts. (In re Marriage of Baker, supra, 204 Cal.App.3d at pp. 218-219; In re Marriage of Campa (1979) 89 Cal.App.3d 113, 120-131 [152 Cal.Rptr. 362].)

[8]In re Marriage of Gillmore did not, however, hold the nonemployee spouse is entitled to receive benefits directly from the retirement plan, rather than from the employee spouse. Family Code section 2610, subdivision (b)(2), prohibits the court dividing community property from ordering preretirement payment of benefits by a plan, unless the plan provides for such benefits or such benefits are provided for in certain California statutes regarding public employee retirement benefits, or in "similar enactments." (See generally, 2 Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 1997) ¶¶ 8:1235 to 8:1236, pp. 8-299.1 to 8.299.2.) In the present case the Plan, by its terms, allows the payment of benefits to a nonparticipant pursuant to a QDRO; the summary plan description provided to participants, moreover, explains that such payment could begin "as early as your attainment of age 55 even if you are still employed and contributing to the Plan." We do not decide whether Mary would be entitled, under Gillmore (and ERISA), to receive from James the unreduced early retirement benefits we will hold the Plan may not pay under ERISA.

[9]More fully, section 1056(d)(3) provides: "(B) For purposes of this paragraph —[¶] (i) the term 'qualified domestic relations order' means a domestic relations

[*In re Marriage of Oddino* 16 Cal.4th 67, page 83]

The parties agree, as did the Court of Appeal, that resolution of this case requires us to interpret the above italicized proviso in section 1056(d)(3)(E)(i)(II). They differ, however, as to its meaning and application. The Plan contends Rule of 75 benefits are an "employer subsidy for early retirement," which may not be paid to an alternate payee before the participant's actual retirement; the "present value of benefits actually accrued," the Plan maintains, was properly calculated by determining the actuarial equivalent of James's normal retirement age (age 65) periodic benefit. Mary maintains, to the contrary, that Rule of 75 benefits are not an "employer subsidy for early retirement" within the meaning of the statute, but are normal retirement benefits accrued under the plan by participants. We conclude the Plan is correct.

First, section 1056(d)(3)(E)(i)(II) limits benefits payable under preretirement QDRO's to "the present value of benefits actually accrued." A participant's "accrued benefit" is defined as an annual benefit commencing at normal retirement age, or as the "actuarial equivalent" of such a benefit. (§§1002(23), 1054(c)(3).) Section 1056(d)(3)(E)(i)(II), therefore, mandates that early retirement benefits paid pursuant to a preretirement QDRO be based on the actuarial value of the participant's normal retirement age benefit; any

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order— [¶] ... [¶] (II) with respect to which the requirements of subparagraphs (C) and (D) are met ... [¶] ... [¶] (D) A domestic relations order meets the requirements of this subparagraph only if such order— [¶] (i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan .... [¶] ... [¶] (E)(i) A domestic relations order shall not be treated as failing to meet the requirements of clause (i) of subparagraph (D) solely because such order requires that payment of benefits be made to an alternate payee— [¶] (I) in the case of any payment before a participant has separated from service, on or after the date on which the participant attains (or would have attained) the earliest retirement age, [and] [¶] (II) as if the participant had retired on the date on which such payment is to begin under such order (but taking into account only the present value of benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement) ...."

greater early retirement benefit represents an increase over "the present value of benefits actually accrued." The Plan was therefore not permitted, under ERISA, to pay Mary a portion of James's benefits before James's retirement without reducing those benefits to the actuarial equivalent of James's age-65 benefit. Unreduced benefits provided by the Rule of 75 could not be paid before James's retirement.

The same conclusion follows if one focuses, as have the parties and the Court of Appeal, on the meaning of "employer subsidy" in section 1056(d)(3)(E)(i)(II). ERISA itself does not define "employer subsidy." The term "subsidy," however, is used in a related context elsewhere in the REA amendments: section 1054(g)(2) prohibits amendment of a plan to eliminate an early retirement benefit or "retirement-type subsidy." The 1984 Senate Report, explaining this provision, parenthetically defined a subsidy as "the excess of the value of a benefit over the actuarial equivalent of the normal

[*In re Marriage of Oddino* 16 Cal.4th 67, page 84]
retirement benefit." (1984 Sen. Rep., supra, 1984 U.S. Code Cong. & Admin. News at p. 2574.) Both parties, the Court of Appeal and amicus curiae California Employment Law Council all embrace this definition of subsidy for the present purpose. We agree this is the probable meaning of subsidy in section 1056(d)(3)(E)(i)(II); the "actuarial equivalent" criterion is also suggested by the command of section 1056(d)(3)(D)(ii) that a QDRO not "require the plan to provide increased benefits (determined on the basis of actuarial value)." (Accord, 2 Hogoboom & King, Cal. Practice Guide: Family Law, supra, ¶ 8:1194, p. 8-286.) Whether Rule of 75 benefits are subsidized, therefore, depends on whether their value is greater than the actuarial value of a participant's normal retirement benefit.

"Normal retirement benefit" is defined in ERISA as "the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement

age." (§1002(22).)[10] James's periodic early retirement benefit under the Plan's Rule of 75 would be the same as, but not greater than, his periodic payment if he retired at age 65. Under the quoted definition, consequently, James's normal retirement benefit is simply his normal retirement age benefit, that is, the periodic amount he would receive if he were to retire from Hughes at age 65.

Applying, next, the definition of a subsidy as "the excess of the value of a benefit over the actuarial equivalent of the normal retirement benefit" (1984 Sen. Rep., supra, 1984 U.S. Cong. & Admin. New at p. 2574), one readily sees that the Rule of 75 benefits are a subsidy. Although the periodic payments available under the Rule of 75 are the same as the age-65 benefit, the value of the Rule of 75 benefit is much greater than the actuarial equivalent of the age-65 benefit. Because the unreduced early retirement annuity available under the Rule of 75 would begin sooner and could be expected on the basis of mortality statistics to be paid for a longer time, its value would exceed the actuarial equivalent of the same annuity commencing when James reaches age 65. The excess value is an early retirement subsidy.

The Court of Appeal, applying the same definitions, nonetheless concluded the Rule of 75 benefits were not subsidized. The court's conclusion rested on its belief the "early retirement benefit" referred to in section 1002(22) is the plan's early retirement benefit "actuarially increased for

[*In re Marriage of Oddino* 16 Cal.4th 67, page 85]
deferment to normal retirement age." Mary adopts the same reasoning, asserting that the law requires "an actuarial increase to defer the [early retirement benefit] to the [normal

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[10]ERISA requires that plans provide an employee's right to the "normal retirement benefit" is "nonforfeitable upon the attainment of normal retirement age." (§1053(a); 26 U.S.C. §411(a).) A nonforfeitable right to benefits is an "unconditional" and "legally enforceable" claim against the plan. (§1002(19).) In other words, an employee must be "100 percent vested in his accrued benefit when he attains the normal or stated retirement age." (1974 Conf. Rep., supra, 1974 U.S. Code Cong. & Admin. News at p. 5050.)

retirement age benefit] form, and payable from age 65." Because section 1002(22) "define[s] the [normal retirement benefit] as the greater of the Plan's [early retirement benefit] and its [normal retirement age benefit]," Mary argues, "the [early retirement benefit] can never be worth more than the [normal retirement benefit]."

The Plan argues persuasively that the Court of Appeal's analysis is circular and would render meaningless Congress's distinction between subsidized and unsubsidized early retirement benefits. If the periodic early retirement benefit used to determine the normal retirement benefit under section 1002(22) were first increased, so that it would have the same actuarial value beginning at age 65 as at early retirement, then, as Mary's own argument reveals, the actuarial value of the Plan's normal retirement benefit would always, by definition, be at least as great as the value of the plan's early retirement benefit. Under that analysis, no early retirement benefit could be considered subsidized. Section 1056(d)(3)(E)(i)(II)'s reference to employer subsidization of early retirement would be rendered meaningless.

We agree with the Plan that Mary and the Court of Appeal misunderstand section 1002(22). The early retirement and normal retirement age benefits referred to there are periodic benefits, without any actuarial adjustment. Section 1022(22) simply ensures that the periodic payments of a participant's normal retirement benefit under a plan will be no smaller than the payments available under the plan's early retirement option, if any. The normal retirement benefit defined in section 1002(22), in other words, does not include the increased value of unreduced early retirement payments. Because unreduced early retirement benefits, such as those available under the Rule of 75, have a value greater than the actuarial equivalent of a plan's normal retirement benefit, they include a subsidy as defined in the 1984 Senate Report.

This understanding of "normal retirement benefit" as used in ERISA is confirmed in a Treasury Department regulation implementing a tax provision of ERISA (26

U.S.C. §411). That regulation defines "normal retirement benefit" as "the periodic benefit under the plan commencing upon early retirement (if any) or at normal retirement age, whichever benefit is greater." (26 C.F.R. §1.411(a)-7(c)(1) (1996), italics added.) An example provided in the Treasury Department regulation, moreover, answers negatively the precise question before us, i.e., whether a plan's "normal retirement benefit" includes the added actuarial value of an unreduced early retirement benefit.

[*In re Marriage of Oddino* 16 Cal.4th 67, page 86]
"Example (1). Plan A provides for a benefit equal to 1% of high 5 years compensation for each year of service and a normal retirement age of 65. The plan also provides for a full unreduced accrued benefit without any actuarial reduction for any employee at age 55 with 30 years of service. Even though the actuarial value of the early retirement benefit could exceed the value of the benefit at the normal retirement age, the normal retirement benefit would not include the greater value of the early retirement benefit because actuarial subsidies are ignored." (26 C.F.R. §1.411(a)-7(c)(6) (1996).)[11]

The above understanding of "normal retirement benefit" is also reflected in the terms of the Plan itself. Section 4.2(c) of the Plan provides that the "monthly Benefit" constituting a participant's "Normal Retirement Benefit" shall not be less than the "largest monthly Benefit" the participant could have received as an early retirement benefit (Plan, §§4.8(a),

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[11]Mary, like the Court of Appeal, relies on another paragraph of the Treasury regulation as supporting her position. Paragraph (c)(2)(ii) provides that if the early retirement annuity is not payable in the same "form" as the annuity payable on retirement at normal retirement age, the former must be converted to the same "form of annuity benefit" as the latter before determining which of the two is greater and therefore which is the normal retirement benefit. (26 C.F.R. §1.411(a)-7(c)(2)(ii) (1996).) Contrary to the position of Mary and the Court of Appeal, that paragraph does not require any actuarial increase in the early retirement benefit to account for its hypothetical deferral to normal retirement age; a difference in commencement time of annuity payments is not a difference in the form of annuity.

4.8(c)) or vested retirement benefit (id., §4.15). Section 4.8(c) of the Plan describes the unreduced "monthly payment" available under the Rule of 75. As under the general definition in section 1002(22), therefore, the "normal retirement benefit" under the Plan is a periodic payment defined as the largest of several possible periodic amounts. The periodic amount of the normal retirement benefit may be equal to the Rule of 75 periodic payment, but it does not include the additional actuarial value of the longer stream of Rule of 75 payments that commence before normal retirement age. Again, the excess value of that stream of payments over the actuarial value of the normal retirement benefit is a subsidy, which under section 1056(d)(3)(E)(i)(II) may not be included in a QDRO when the participant has not actually retired.

Our reading of section 1056(d)(3)(E)(i)(II) is further supported by legislative history directly concerning that subsection. The 1984 Senate Report explains the subsection as follows: "When payments are made to an alternate payee before the participant retires, the payments are computed by taking into account only benefits actually accrued and not taking into account any employer subsidy for early retirement. The amount to be paid to the alternate payee is to be calculated by using the participant's normal retirement benefit

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accrued as of the date payout begins and by actuarially reducing such benefit based on the interest rate specified in the plan or 5 percent, if the plan does not specify an interest rate."[12] (1984 Sen. Rep., supra, 1984 Code Cong. & Admin. News at p. 2567, italics added; see also BNA Legislative History, supra, at pp. 250-251 [remarks of Rep. Clay, explaining operation of QDRO provisions through examples: where plan provides a "supplement" for retirement between

[12]Section 1.6 of the Plan specifies the interest and mortality rates to be used in making such actuarial reductions.

ages of 55 and 62, former spouse may elect to begin receiving benefits when participant reaches age 55, but may not receive supplement if participant does not retire before age 62].) Under Mary's approach, she could receive periodic payments based on the normal periodic retirement benefit, without any actuarial reduction in amount to account for the earlier commencement and the longer stream of payments, despite the fact James continued to work for Hughes. The legislative history confirms that Congress did not intend a QDRO to increase a plan's obligations in this manner.

Finally, the Plan's understanding of its Rule of 75 benefits as an employer subsidy for early retirement is supported by the common understanding among courts and commentators as to the subsidized character of unreduced early retirement benefits. For example, the United States Supreme Court, in a decision concerning a plan's ERISA obligations upon plan termination, described the plan's early retirement benefits as follows: "At age 55, participants were eligible for early retirement benefits, calculated in the same manner as normal retirement benefits, but reduced by five percent for each year by which a participant's retirement preceded the normal retirement age. [Citations.] *A subsidized or unreduced early retirement benefit, i.e.*, a benefit equal to that payable at age 65, was available to participants who had 30 or more years of service and elected to retire after age 62." (Mead Corp. v. Tilley (1989) 490 U.S. 714, 719 [109 S.Ct. 2156, 2160, 104 L.Ed.2d 796], italics added.) Another federal decision recently described a bank's early retirement benefits as including, for qualifying participants, " 'unreduced early retirement benefits.' These benefits included a *subsidy* from the Bank so that from the date of early retirement a retiree would receive benefit payments equivalent to those he would have received had he postponed retirement until age sixty-five." (Hein v. F.D.I.C. (3d Cir. 1996) 88 F.3d 210, 213, italics added; see also, Larson v. Northrop Corp. (D.C. Cir. 1994) 21 F.3d 1164, 1166, fn. 2 ["An early retirement subsidy 'is the excess of the value of

the early retirement benefit over the actuarial equivalent of the accrued benefit payable at the normal retirement age.' "].)

Commentators have similarly characterized unreduced early retirement benefits as subsidized. A practitioners' guidebook on QDRO's explains the

[*In re Marriage of Oddino* 16 Cal.4th 67, page 88]
term "early retirement subsidy" by noting that early retirement benefits are usually reduced "to reflect the fact that the payments will be paid for many additional years. An early retirement subsidy exists if a participant retires before the normal retirement age and receives a retirement benefit that has not been actuarially reduced." (Meyen & Dundee, Qualified Domestic Relations Order Answer Book (1996) Q1:61, p. 1-45.) A California family law treatise explains that when the participant has not retired, the former spouse's benefit under a QDRO is limited to the actuarial value of normal retirement benefits: "This may be much less than the amount which would have been paid if the employee actually had retired early (because early retirement is often subsidized by the employer)." (2 Hogoboom & King, Cal. Practice Guide: Family Law, supra, ¶ 8:1194, p. 8-286.) We agree with these courts and commentators that unreduced early retirement benefits are an employer subsidy that, under section 1056(d)(3)(E)(i)(II), may not be ordered paid under a QDRO while the participant continues to work for the plan sponsor.

As reflected in the above comments, employers not infrequently subsidize employees' early retirement as an incentive for specified groups of employees to leave the employer's work force voluntarily, so as to reduce its wage burden or "avoid litigation that might result from laying off an employee." (Lockheed Corp. v. Spink (1996) ___ U.S. ___ [116 S.Ct. 1783, 1791, 135 L.Ed.2d 153, 166].) Such subsidized early retirement programs are a "quid pro quo between the plan sponsor and the participant." (Id. at p. __ [116 S.Ct. at p. 1791, 135 L.Ed.2d at p. 165].) Mary,

however, seeks to make Hughes pay the quid without getting the quo. As sponsor of the Plan, Hughes would remain responsible for funding the portion of James's Rule of 75 benefits paid to Mary, while James continued to work and receive salary and other benefits from Hughes. Section 1056(d)(3)(E)(i)(II) appears designed to avoid just such a result.

Nothing we say here, we note, precludes recalculation of Mary's payments if James actually takes early retirement. Upon the participant's retirement with subsidized early retirement benefits, ERISA does not prohibit modification of a previous order "so that the alternate payee also receives a share of the subsidized benefit." (1984 Sen. Rep., supra, p. 21, 1984 U.S. Code Cong. & Admin. News at p. 2567.) The Plan concedes the superior court retains jurisdiction to modify its QDRO, and expressly waives any objection to such a recalculation upon James's early retirement.

Disposition

We conclude the Court of Appeal erred in directing the superior court to order the Plan to pay Mary benefits calculated under the Rule of 75. The judgment of the Court of Appeal is reversed.

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George, C. J., Mosk, J., Kennard, J., Baxter, J., Chin, J., and Brown, J., concurred.[In re Marriage of Oddino 16 Cal.4th 67, page 89a]

APPENDIX B:
ODDINO I

IN RE MARRIAGE OF ODDINO (1996)
48 CAL.APP.4th 965, ___CAL.RPTR.2d___

NO. B068557.

SECOND DIST., DIV. TWO.

JUL 24, 1996.

In re the Marriage of MARY K. and JAMES M. ODDINO. MARY K. ODDINO, Appellant, v. JAMES M. ODDINO, Respondent; HUGHES NON-BARGAINING RETIREMENT PLAN, Claimant and Respondent.

COUNSEL

Glasser and Smith and Robert Glasser for Appellant.

O'Melveny & Myers, Wayne S. Jacobsen and Todd R. Wulffson for Claimant and Respondent.

Paul, Hastings, Janofsky & Walker, Ethan Lipsig, Proskauer Rose Goetz & Mendelsohn, Jeffrey A. Berman, Paula J. Page, Karen L. Handorf, Barbara A. Matthews and Bettina Redway as Amici Curiae on behalf of Claimant and Respondent.

No appearance for Respondent.

OPINION

MAJORITY: BOREN, P. J.—

This appeal arises out of a marital dissolution action. Appellant wife, Mary K. Oddino, appeals following a May 8, 1992, order which, inter alia, denied her order to show cause seeking a different calculation of her community share of the retirement benefits of her husband, James M. Oddino. According to the interpretation of respondent, Hughes Non-Bargaining Retirement Plan (hereinafter, the Hughes Plan),

which administers husband's retirement plan sponsored by Hughes Aircraft Company, wife's proportionate share (i.e., 36.6231 percent) of her husband's retirement benefit should be calculated as if husband were eligible to retire at age 65, rather than at age 55, which was husband's earliest retirement age under the Hughes Plan by virtue of his years of service and the so-called Rule of 75.[1] The terms of the qualified domestic relations order (hereinafter,

[*In re Marriage of Oddino* 48 Cal.App.4th 965, page 969] QDRO),[2] filed on March 24, 1989, which converted wife's benefit under the pension from a lifetime annuity to a benefit payable in 60 monthly installments, provided that payments to wife were to be determined as if husband had retired on April 1, 1988, with payments to commence on April 1, 1988, "or as soon thereafter as practical."[3] The Hughes Plan

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[1] The Rule of 75 (i.e., section 4.8 (c) of the retirement plan) provides that an employee who has attained age 55, and for whom the sum of his attained age and years of continuous service equals or exceeds 75, is entitled to the same full, unreduced normal retirement benefit as if the employee had separated from service at the age of 65. The administrative committee of the Hughes Plan views the Rule of 75 early retirement as a "subsidy" to participants who retire prior to the normal retirement age of 65.

[2] A QDRO is a state court domestic relations order which qualifies under federal law to allow a private pension plan, pursuant to the Employee Retirement Income Security Act (hereinafter, ERISA; see 29 U.S.C. 1001 et seq.), to be divided so that a nonemployee spouse may be awarded an appropriate share of such a plan, thus rendering ERISA's alienation and assignment prohibitions inapplicable for the benefit of the nonemployee spouse. (See 29 U.S.C. 1056(d)(3).)

[3] Husband was then eligible for early retirement but had not at that time retired, though we have been advised by counsel for the Hughes Plan that husband has since retired on October 1, 1994, with benefits under the Rule of 75. ERISA, of course, permits a nonemployee spouse to share in retirement benefits pursuant to a QDRO, even prior to retirement by the employee spouse. ERISA specifically provides that a domestic relations order is not precluded from constituting a valid QDRO and does not improperly require a retirement plan to provide a benefit not otherwise provided by the terms of the plan "solely because such order requires that payment of benefits be made to an alternate payee [] as if the participant had retired on the date on which such payment is to begin under such order ...." (29 U.S.C. 1056(d)(3)(E)(i)(II).) The operative language, "as if the participant had retired" (ibid.), presumes that the employee spouse has reached

interpreted the QDRO by using the age 65 vested retirement benefit which provided wife with monthly payments of $1,563.70; use of the early retirement benefit of Rule of 75 would have provided her with monthly payments of $3,689.60 calculated commencing from April 1, 1988, plus any cost-of-living adjustments. The Hughes Plan ultimately commenced payment of wife's share of the benefits on March 1, 1990.

We hold that the trial court erred in denying the order to show cause. The Rule of 75 early retirement was not a subsidy, the QDRO thus did not improperly require payment greater than the actuarial equivalent of the permissible retirement benefits, and the Rule of 75 benefit was an accrued benefit to which wife was entitled pursuant to the QDRO and ERISA. We also find that the Hughes Plan must pay interest on delayed benefit payments to wife and on the unpaid balance due, but we need not discuss the calculation of such interest, which should be addressed in the first instance by the trial court.

[*In re Marriage of Oddino* 48 Cal.App.4th 965, page 970]

Discussion

I. Federal and State Law

The crux of the problem in the present case is whether the Rule of 75 early retirement provision constitutes an employer subsidy for early retirement or constitutes an accrued benefit. The significance of this distinction arises because ERISA limits the amount of benefits which may be paid pursuant to a QDRO, where the employee has not actually retired but has attained "the earliest retirement age." (29 U.S.C. 1056 (d)(3)(E)(i)(I).) ERISA limits the benefits amount by "taking into account only the present value of benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement ...." (29 U.S.C.

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the age of eligibility to receive retirement benefits under the terms of the retirement plan at issue (see Dickerson v. Dickerson (E.D. Tenn. 1992) 803 F.Supp. 127, 133-134), which is the situation in the present case.

$1056(d)(3)(E)(i)(II).) If payment to the nonemployee spouse was not based on the present value of benefits actually accrued, but rather was based on an employer subsidy, the domestic relations order could direct payment of benefits in excess of the employee spouse's benefits, thus precluding the order from constituting a valid QDRO. (29 U.S.C. 1056(d)(3)(D)(ii) [order does not meet definition of QDRO if it requires "plan to provide increased benefits (determined on the basis of actuarial value)"].) Moreover, a domestic relations order cannot be a QDRO if it requires "a plan to provide any type or form of benefit, or an option, not otherwise provided under the plan ...." (29 U.S.C. 1056(d)(3)(D)(i).)

In assessing whether the Rule of 75 early retirement provision in the present case is an employer subsidy or an accrued benefit the parties herein have addressed conflicting pre-QDRO case law; i.e., cases prior to the amendment of ERISA by the Retirement Equity Act of 1984 (hereinafter, REA; see Pub. L. No. 98-397, 98 Stat. 1426 (Aug. 23, 1984), discussed in In re Marriage of Baker (1988) 204 Cal.App.3d 206, 213-220 [251 Cal.Rptr. 126]), which more clearly delineated a spouse's interest in an employee's pension benefits. (See, e.g., American Stores Co. v. Retirement Plan (10th Cir. 1991) 928 F.2d 986 [early retirement plan was a subsidy and not an accrued benefit and thus employer could eliminate early retirement subsidies for all plan participants]; Amato v. Western Union Intern., Inc. (2d Cir. 1985) 773 F.2d 1402, 1413 [holding to the contrary under pre-REA law].) REA resolved the controversy between cases such as American Stores and Amato by providing that early retirement benefits are treated as accrued and may not be reduced or eliminated even if the benefits constitute a retirement-type subsidy. (29 U.S.C. 1054(g)(2).) REA also, however, set forth QDRO procedures and established a distinction between "benefits actually accrued" and an "employer subsidy for early retirement" (29 U.S.C. 1056 (d)(3)(E)(i)(II)), as previously discussed. ERISA had defined

the term "accrued benefit" as meaning in the case of a defined benefit plan, as here, "the

[*In re Marriage of Oddino* 48 Cal.App.4th 965, page 971] individual's accrued benefit determined under the plan ... expressed in the form of an annual benefit commencing at normal retirement age ...." (29 U.S.C. 1002(23).) Nonetheless, REA provided no definitional guidance as to "employer subsidy for early retirement."

We note that the court in Amato v. Western Union Intern., Inc., supra, 773 F.2d 1402, struggled to find a definition of subsidy and concluded that "the term 'subsidized early retirement benefit' is not defined in the I.R.C. [Internal Revenue Code], the Regulations promulgated thereunder, ERISA, the [terms of the] present [pension plan at issue in Amato], or in the contemporaneous legislative history." (Id. at p. 1413.) The Hughes Plan acknowledges the following parenthetical definition from REA legislative history on plan amendments: "benefit subsidy (the excess of the value of a benefit over the actuarial equivalent of the normal retirement benefit)." (1984 U.S. Code Cong. & Admin. News, at p. 2574.) Significantly, ERISA defines "normal retirement benefit" as "the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age." (29 U.S.C. 1002(22).) As here, where the Rule of 75 benefit is defined from the date of early retirement and not from normal retirement age, a retirement plan's early retirement benefit must be actuarially increased for deferment to normal retirement age before comparing it to the actuarial value of the normal retirement age benefit annuity payments. Then the benefits compared are in comparable forms, and the larger of the two benefits becomes the normal retirement benefit. (See I.R.S. Treas. Regs. 26 C.F.R. 1.411(a)-7(c)(2)(ii) (1996).)

Accordingly, a benefit subsidy would thus be defined as the excess of the value of a benefit over the actuarial equivalent of whichever is greater between (1) the early

retirement benefit under the plan, or (2) the benefit under the plan commencing at normal retirement. An early retirement benefit does not necessarily entail a subsidy, rather than an accrued benefit. Contrary to the contention of the Hughes Plan, a subsidy is therefore not simply the excess of the value of an early retirement benefit over the value of the normal retirement benefit payable at normal retirement.

Nor is there any support for the position of the Hughes Plan in traditional California case and statutory law. It is undisputed that a nonemployee spouse is entitled to receive payments from the employee spouse's interest in the employer's retirement fund prior to retirement if the employee is eligible to retire (In re Marriage of Gillmore (1981) 29 Cal.3d 418 [174 Cal.Rptr. 493, 629 P.2d 1]), and that a divorce must not increase the obligations of an employer's retirement plan (29 U.S.C. 1056(d)(3)(D)(ii) & (E)(i)(II); see also former Civ. Code, 4800.8, continued without substantive change in

[*In re Marriage of Oddino* 48 Cal.App.4th 965, page 972]
Fam. Code, 2610, subd. (b)). Indeed, " 'the employer is entitled to certainty concerning its obligations under its retirement program and must not be required to do more than is required by its contract with the employee spouse ....' " (In re Marriage of Nice (1991) 230 Cal.App.3d 444, 450 [281 Cal.Rptr. 415].) We thus turn to the Hughes Plan and the particular terms of the contract with the employee spouse.

II. The Hughes Non-bargaining Retirement Plan

The Hughes Plan asserts on appeal that the Rule of 75 benefit is a subsidy because Hughes subsidizes this early retirement inducement by its contributions to the retirement plan. However, there is no support in the record for the assertion that the Rule of 75 benefit was funded any differently than any other plan benefit; i.e., funded by Hughes's tax deductible contributions during the past years. Nor is there any legal support for the notion that how a benefit is funded determines if it is a subsidy.

Contrary to the claim of the Hughes Plan, pursuant to the terms of the retirement plan, and consistent with the previously discussed REA legislative history, a participant's normal retirement benefit is not necessarily the benefit payable on the normal retirement date at age 65. Section 1.37 of the retirement plan defines the normal retirement benefit as "the Benefit payable under Section 4.2." Section 4.2(c), under the broad heading in Section 4.2 of "Normal Retirement Benefit," also includes provisions for the early and late retirement versions (4.8 and 4.10) of the normal retirement benefit. The terms of the retirement plan thus comply with the ERISA requirement that the normal retirement benefit constitute the greater of the early retirement benefit under the plan or the benefit under the plan commencing at normal retirement age (29 U.S.C. 1002 (22)), since the Hughes Plan makes the monthly benefit under any of its normal retirement benefits no less than the greater of three early payouts available[4] pursuant to Section 4.2(c).

The term "normal retirement" benefit thus does not necessarily refer to the "normal retirement age," and a participant's normal retirement benefit under the Hughes Plan is not always equivalent to the benefit payable at age 65. In the present case, the Rule of 75 is not a subsidy because it is the normal retirement benefit when the criteria of 75 years are met. (Cf. Richardson v. Pension Plan of Bethlehem Steel (9th Cir. 1995) 67 F.3d 1462, 1468-1469

[*In re Marriage of Oddino* 48 Cal.App.4th 965, page 973] [monthly plant shutdown payments due from time of shutdown to commencement of normal retirement age benefit and which continue being paid after retirement age are a retirement-type subsidy].) Accordingly, the Hughes Plan erred in computing wife's benefit as an alternate payee by

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[4] One payout would be in the form of an early retirement benefit with the Rule of 75 satisfied and paying the accrued benefit, a second payout would be without the Rule of 75 and paying a reduced vested retirement benefit, and a third payout would be the vested retirement benefit itself.

starting with the benefit that would have been payable at age 65 and then reducing the benefit to its actuarial equivalent.

III. Retirement Benefits Valuation Date and Interest

The Hughes Plan does not dispute the holding in In re Marriage of Crook (1992) 2 Cal.App.4th 1606 [3 Cal.Rptr.2d 905], that " 'the appropriate date of valuation of retirement or pension benefits is the date of trial or the date [set for] payment of benefits.' " (Id. at p. 1612.) Similarly, ERISA acknowledges a retirement plan's liability to the alternate payee as if the participant had retired "on the date on which such payment is to begin under [the QDRO]." (29 U.S.C. 1056(d)(3)(E)(i)(II).) In the present case, the QDRO required that payments to wife were "to commence as of April 1, 1988, or as soon thereafter as practical." The Hughes Plan commenced payments to wife on March 1, 1990, based on husband's age at that time, but calculated the payments to her as of the date payments actually commenced. Wife contends that the benefits should have been calculated and paid to her as of April 1, 1988, and that the trial court erred in approving the amount of benefits paid from March 1, 1990.

We acknowledge that the QDRO's projected date for the payment of benefits was April 1, 1988. However, the order apparently envisioned some delay and specifically permitted payment then "or as soon thereafter as practical." Moreover, the order was not issued and served until April 5, 1989. The order did not specify retroactive payments, though it did provide that payments to wife "are to be determined as if [husband] had retired on April 1, 1988." ERISA requires that the plan administrator shall "within a reasonable period after receipt" (29 U.S.C. 1056(d)(3)(G)(i)(II)) of the order determine whether it constitutes a QDRO, and contemplates that an "18-month period" could ensue from the date the first payment would be required under the order until the plan administrator determines the order constitutes a QDRO. (29 U.S.C. 1056(d)(3)(H)(ii) & (v).) Here, there was an intended first payment date which was not a rigid date, and payments began to wife approximately 12 months after the Hughes

Plan received the order. The delay was under the circumstances not unreasonable.

Nonetheless, a retirement plan "shall pay the segregated amounts (including any interest thereon)" (29 U.S.C. 1056(d)(3)(H)(ii)) during the period

[*In re Marriage of Oddino* 48 Cal.App.4th 965, page 974] in which the QDRO status of a domestic relations order is being determined. As indicated by the declaration of a member of the administrative committee of the Hughes Plan, it does not pay such interest. However, it must pay for the failure to be more prompt by paying interest as required by statute. Such a conclusion is also consistent with the observation in In re Marriage of Gillmore, supra, 29 Cal.3d 418, 424, footnote 4: "[B]oth the timing of receipt and the control of an asset are important aspects of its value. 'Postponement, especially late in life, is often the equivalent of complete defeat....' " The payment of interest may compensate for delay or discourage its occurrence. The assertion by the Hughes Plan that it paid the equivalent of interest by using husband's actual age at the date benefit payments commenced is unavailing. Interest, not its purported equivalent, is what is called for by the statute.

IV. Assertion of Preemption

Following our grant of a petition for rehearing in the present case, the Secretary of the United States Department of Labor (hereinafter, the Secretary) filed an amicus curiae brief in support of the Hughes Plan. The Secretary urged for the first time on appeal that the provisions of the California Family Code which permit an employee benefit plan to be joined as a party in a dissolution proceeding (see, e.g., Fam. Code, 2060, subd. (a), 2063, subd. (a), 2065, 2071-2074) are preempted by ERISA. Apart from the lack of merit in such a contention (In re Marriage of Baker, supra, 204, Cal.App.3d at p. 218; In re Marriage of Olivarez (1986) 188 Cal.App.3d 336, 342 [232 Cal.Rptr. 794]; see In re Marriage of Levingston (1993) 12 Cal.App.4th 1303, 1306 [16

Cal.Rptr.2d 100]), the claim is improperly before us. An appellate court will generally consider only issues properly raised by the appealing parties, not completely new contentions urged for the first time by amici curiae, who would otherwise exert unwarranted last-minute control over the issues decided on appeal. (Knetsch v. United States (1960) 364 U.S. 361, 370 [5 L.Ed.2d 128, 134, 81 S.Ct. 132]; Eggert v. Pacific States S. & L. Co. (1943) 57 Cal.App.2d 239, 251 [136 P.2d 822].) Wife's request for sanctions against the Secretary is denied.

Disposition

The order under review (which included the award of attorney fees and costs) is reversed and vacated, with directions to order that the Hughes Plan pay to wife 36.6231 percent of the Rule of 75 early retirement benefit, plus

[*In re Marriage of Oddino* 48 Cal.App.4th 965, page 975] appropriate interest on the delayed and unpaid balances. Wife is entitled to costs on appeal.

Fukuto, J., and Brandlin, J., * * concurred.

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* Judge of the Municipal Court for the South Bay Judicial District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX C:
STATEMENT OF DECISION AND ORDER ON ORDER TO SHOW CAUSE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MARY K. ODDINO, Petitioner, v. JAMES M. ODDINO, Respondent.	CASE NO. NWD 90975 STATEMENT OF DECISION AND ORDER ON ORDER TO SHOW CAUSE DATE; February 28, 1992 TIME: 9:00 a.m. DEPT: NW "J"
HUGHES NON-BARGAINING RETIREMENT PLAN, Claimant	

On February 28, 1992 at 9:00 a.m. Petitioner's Order to Show Cause came on regularly for hearing in Department J of the above-entitled Court, the Honorable David R. Nisall presiding. On consideration of the papers filed by the parties and the oral arguments presented by counsel at the hearing, the Court made the following findings and rulings: {2}

1. The "Stipulation and Order Re Modification of Interlocutory Judgment and Qualified Domestic Relations Order" filed on March 24, 1989 was not signed by the Claimant. The Claimant was joined as a part to this action only after such QDRO and the Interlocutory Judgment were entered.

2. Respondent has not retired.

3. The estimate of benefits payable (Exhibit H to Petitioner's Memorandum of Points and Authorities) was

requested by Respondent, rather than Petitioner. The estimate made certain assumptions and contains a caveat or disclaimer.

4. The method of calculating benefits referred to in this action as the "Rule of 75" constitutes a subsidy rather than an accrued benefit. Accordingly, for the reasons set forth in the Memorandum of Points and Authorities submitted by Claimant, the Rule of 75 subsidy benefit is not payable to a spouse prior to the actual retirement of the working spouse.

5. Claimant's actuarial calculations factoring in present value, and not including the present value of the employer subsidy for early retirement, appear proper under REA and ERISA and not arbitrary nor capricious.

6. Estoppel is not allowed in this action as a matter of law under the Employee Retirement Income Security Act. In the event estoppel were allowed as a matter of law, the elements of {3} estoppel have not been established; the Claimant did not know of Petitioner's plans, nor did it know when Respondent would retire; nor has it been shown that Claimant issued its benefit estimate to induce Petitioner to act.

7. The Claimant did not take an unreasonable amount of time to approve the Qualified Domestic Relations Order and to commence payments under the Qualified Domestic Relations Order. The payments under the Qualified Domestic Relations Order were in an amount sufficient to recompense Petitioner for the period of time prior to commencement of such payments.

8. The Claimant did not unreasonably withhold information from the Petitioner.

Based upon the foregoing, the papers filed by the parties and the oral arguments presented at the hearing, the Court rules as follows regarding the requests for relief before the Court;

A. All of Petitioner's requests for relief against the Claimant are denied.

B. Should Respondent actually retire before age 65, or during the five-year period after Respondent first qualified to retire and while the Petitioner is receiving benefit payments, Petitioner would be entitled to a recomputation of the benefits payable from the Claimant to the Petitioner. Such recomputation may result in no change in amount, and as the result of such {4} recomputation is purely speculative the Court makes no ruling in this regard. The reservation of jurisdiction concerning payments from Claimant shall continue in force.

C. Pursuant to the stipulation of the Petitioner and the Respondent, the Court did not rule on Petitioner's request for relief against Respondent.

D. Each party shall bear its own attorneys' fees and costs.

DATED: March 27, 1992

O'MELVENY & MYERS
WAYNE S. JACOBSEN
TODD R. WULFFSON

By: /s/
Wayne S. Jacobsen
Attorneys for the Hughes Non-Bargaining Retirement Plan

IT IS SO ORDERED

DATED: May 8, 1992

/s/
David R. Nisall
Commissioner, Los Angeles County Superior Court

APPENDIX D:
CALIFORNIA SUPREME COURT DENIAL OF PETITION FOR REHEARING

Second Appellate District, Division Two, No. B068557
S055819

IN THE SUPREME COURT OF CALIFORNIA

In Re the Marriage of MARY K. AND JAMES M. ODDINO

v.

JAMES M. ODDINO, Respondent

Petition for rehearing DENIED.

SUPREME COURT
FILED
OCT 15, 1997
Robert Wandruff Clerk
DEPUTY

/s/ (George)
Chief Justice

APPENDIX E:
QUALIFIED DOMESTIC RELATIONS ORDER

Sidney L. Radus, Law Corporation
Suite 201 Civic Center Law Building
611 Civic Center Drive West
Santa Ana, California 92701
(714) 541-4411

Attorney for Petitioner

FILED
MAR 24 1989
FRANK 3. ZOLIN
/s/ A. Kidder
BY A KIDDER
DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

In re the Marriage of:	) CASE NO. NWD 90975
Petitioner:	) STIPULATION AND
MARY K. ODDINO	) ORDER RE
and	) MODIFICATION OF
Respondent:	) INTERLOCUTORY
JAMES M. ODDINO	) JUDGMENT AND
	) QUALIFIED DOMESTIC
	) RELATIONS ORDER

Petitioner, MARY L. ODDINO (GLASSMAN) and Respondent, JAMES M. ODDINO, stipulate to modify the terms of the Interlocutory Judgment entered January 19, 1983, by adding the following language to Paragraph 3(d) thereof:

a. Petitioner's interest in the Hughes Aircraft Company Bargaining/Non Bargaining Retirement Plan is to be determined by the following formula: a fraction, the numerator of which is the number of days (6,776) Respondent has participated in the Plan to date of separation which was June 22, 1981, and the denominator of which is the total days (9,251) of Respondent's participation in the plan to April 1, 1988, divided by one-half (1/2), then multiplied by the Respondent's accrued benefit as of April 1, 1988, i.e., 36.6231%.

b. The option to be paid to Petitioner is the Period Certain Annuity for a five (5) year period.

c. The payments to Petitioner are to be determined as if Respondent had retired on April 1, 1988 and payments to Petitioner are to commence as of April 1, 1988, or as soon thereafter as practical.

d. The Social Security Number of Petitioner is 388-32-8581.

e. The benefit payable to Petitioner is based on the lief expectancy to Respondent.

f. The Participant Contributions Account plus interest are to be divided as specified in paragraph a., above.

g. Hughes Aircraft Company Bargaining/Non-Bargaining Retirement Plan is ordered to pay directly to Petitioner, whose mailing address is 21781 Montbury Drive, El Toro, California, 92630.

h. If Petitioner should die prior to receiving her total disbursement, the death benefit based on the Participant Contribution Account, if any, shall be payable to Jeffrey A. Glassman, over age 21 years, whose mailing address is 21781 Montbury Drive, El Toro, CA 92630.

i. The intent of this Stipulation is to conform to the interlocutory Judgment with the requirements imposed by the Retirement Equity Act of 1984 relating to Qualified Domestic Relations Orders (QDRO).

DATED: 3/3/89 /s/ (James M. Oddino)
JAMES M. ODDINO,
Respondent

DATED: 1/22/89 /s/ (Mary K. Oddino Glassman)
MARY K. ODDINO
(GLASSMAN), Petitioner

IT IS SO ORDERED
DATED: MAR 24, 1989 /s/ (David R. Nisall)
JUDGE OF THE SUPERIOR
COURT
Ak

Court Commissioner
Los Angeles County

APPENDIX F:
STATUTES

Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Retirement Equity Act of 1984 ("REA"), Public Law 98-397, August 23, 1984

§1002 Definitions

...

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

...

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

...

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

...

(22) The term "normal retirement benefit" means the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age. The normal retirement benefit shall be determined without regard to -

(A) medical benefits, and

(B) disability benefits not in excess of the qualified disability benefit.

For purposes of this paragraph, a qualified disability benefit is a disability benefit provided by a plan which does not exceed the benefit which would be provided for the participant if he separated from the service at normal retirement age. For purposes of this paragraph, the early

retirement benefit under a plan shall be determined without regard to any benefit under the plan which the Secretary of the Treasury finds to be a benefit described in section 1054(b)(1)(G) of this title.

. . .

(23) The term "accrued benefit" means -

(A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 1054(c)(3) of this title, expressed in the form of an annual benefit commencing at normal retirement age, or

(B) in the case of a plan which is an individual account plan, the balance of the individual's account.

The accrued benefit of an employee shall not be less than the amount determined under section 1054(c)(2)(B) of this title with respect to the employee's accumulated contribution.

---

§1054 Benefit accrual requirements

(a) Satisfaction of requirements by pension plans

Each pension plan shall satisfy the requirements of subsection (b)(3) of this section, and -

(1) in the case of a defined benefit plan, shall satisfy the requirements of subsection (b)(1) of this section; and

(2) in the case of a defined contribution plan, shall satisfy the requirements of subsection (b)(2) of this section.

(b) Enumeration of plan requirements

(1) . . .

(C) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which any participant is entitled upon his separation from the service is not less than a fraction of the annual benefit commencing at normal retirement age to which he would be entitled under the plan as in effect on the date of his separation if he continued to earn annually until normal retirement age the same rate of compensation upon which his normal retirement

benefit would be computed under the plan, determined as if he had attained normal retirement age on the date any such determination is made (but taking into account no more than the 10 years of service immediately preceding his separation from service). Such fraction shall be a fraction, not exceeding 1, the numerator of which is the total number of his years of participation in the plan (as of the date of his separation from the service) and the denominator of which is the total number of years he would have participated in the plan if he separated from the service at the normal retirement age. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(c) Employee's accrued benefits derived from employer and employee contributions

...

(3) For purposes of this section, in the case of any defined benefit plan, if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, or if the accrued benefit derived from contributions made by an employee is to be determined with respect to a benefit other than an annual benefit in the form of a single life annuity (without ancillary benefits) commencing at normal retirement age, the employee's accrued benefit, or the accrued benefits derived from contributions made by an employee, as the case may be, shall be the actuarial equivalent of such benefit or amount determined under paragraph (1) or (2).

---

§1054(g)(2)

(g) Decrease of accrued benefits through amendment of plan

(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other

than an amendment described in section 1082(c)(8) or 1441 of this title.

(2) For purposes of paragraph (1), a plan amendment which has the effect of -

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

(3) ...

---

§1056(d)

(d) Assignment or alienation of plan benefits

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

(2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before September 2, 1974. The preceding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued non-forfeitable benefit and is exempt from the tax imposed by section 4975 of title

26 (relating to tax on prohibited transactions) by reason of section 4975(d)(1) of title 26.

(3)(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

(B) For purposes of this paragraph -

(i) the term "qualified domestic relations order" means a domestic relations order -

(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and

(ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which -

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a State domestic relations law (including a community property law).

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies -

(i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order -

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

(E)(i) A domestic relations order shall not be treated as failing to meet the requirements of clause (i) of subparagraph (D) solely because such order requires that payment of benefits be made to an alternate payee -

(I) in the case of any payment before a participant has separated from service, on or after the date on which the participant attains (or would have attained) the earliest retirement age,

(II) as if the participant had retired on the date on which such payment is to begin under such order (but taking into account only the present value of benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement), and

(III) in any form in which such benefits may be paid under

For purposes of subclause (II), the interest rate assumption used in determining the present value shall be the interest rate specified in the plan or, if no rate is specified, 5 percent.

(ii) For purposes of this subparagraph, the term "earliest retirement age" means the earlier of -

(I) the date on which the participant is entitled to a distribution under the plan, or

(II) the later of the date of the participant attains age 50 or the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

(F) To the extent provided in any qualified domestic relations order -

(i) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of section 1055 of this title (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes), and

(ii) if married for at least 1 year, the surviving former spouse shall be treated as meeting the requirements of section 1055(f) of this title.

(G)(i) In the case of any domestic relations order received by a plan -

(I) the plan administrator shall promptly notify the participant and each alternate payee of the receipt of such order and the plan's procedures for determining the qualified status of domestic relations orders, and

(II) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

(ii) Each plan shall establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders. Such procedures -

(I) shall be in writing,

(II) shall provide for the notification of each person specified in a domestic relations order as entitled to payment of benefits under the plan (at the address included in the domestic relations order) of such procedures promptly upon receipt by the plan of the domestic relations order, and

(III) shall permit an alternate payee to designate a representative for receipt of copies of notices that are sent to the alternate payee with respect to a domestic relations order.

(H)(i) During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise), the plan administrator shall separately account for the amounts (hereinafter in this subparagraph referred to as the "segregated amounts") which would have been payable to the alternate payee during such period if the order had been determined to be a qualified domestic relations order.

(ii) If within the 18-month period described in clause (v) the order (or modification thereof) is determined to be a qualified domestic relations order, the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons entitled thereto.

(iii) If within the 18-month period described in clause (v) -

(I) it is determined that the order is not a qualified domestic relations order, or

(II) the issue as to whether such order is a qualified domestic relations order is not resolved, then the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons who would have been entitled to such amounts if there had been no order.

(iv) Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period described in clause (v) shall be applied prospectively only.

(v) For purposes of this subparagraph, the 18-month period described in this clause is the 18-month period beginning with the date on which the first payment would be required to be made under the domestic relations order.

(I) If a plan fiduciary acts in accordance with part 4 of this subtitle in -

(i) treating a domestic relations order as being (or not being) a qualified domestic relations order, or

(ii) taking action under subparagraph (H), then the plan's obligation to the participant and each alternate payee shall be discharged to the extent of any payment made pursuant to such Act.

(J) A person who is an alternate payee under a qualified domestic relations order shall be considered for purposes of any provision of this chapter a beneficiary under the plan. Nothing in the preceding sentence shall permit a requirement under section 1301 of this title of the payment of more than 1 premium with respect to a participant for any period.

(K) The term "alternate payee" means any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

(L) This paragraph shall not apply to any plan to which paragraph (1) does not apply.

(M) Payment of benefits by a pension plan in accordance with the applicable requirements of a qualified domestic relations order shall not be treated as garnishment for purposes of section 1673(a) of title 15.

(N) In prescribing regulations under this paragraph, the Secretary shall consult with the Secretary of the Treasury.

---

§1104. Fiduciary duties

-STATUTE-

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and -

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary) -

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III of this chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement -

(i) under section 4980(d)(2)(B) of title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement -

(i) under section 4980(d)(2)(A) of title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection -

(A) any term used in this subsection which is also used in section 4980(d) of title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to title 26 shall be a reference to title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

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§1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought -

(1) by a participant or beneficiary -

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or

(ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or

(ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title (FOOTNOTE 1) or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

(FOOTNOTE 1) So in original. Probably should be "subtitle".

...

§1132(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the

district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

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§1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

§1144(b)(7)

(b) Construction and application

... [¶] (7) Subsection (a) of this section shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title), qualified medical child support orders (within the meaning of section 1169(a)(2)(A) of this title), and the provisions of law referred to in section 1169(a)(2)(B)(ii) of this title to the extent enforced by qualified medical child support orders.

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28 U.S.C. §1257(a)

Sec. 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of,

or any commission held or authority exercised under, the United States.

Treasury Regulations
26 C.F.R. §1.411(a)-7(a)
Sec. 1.411(a)-7 Definitions and special rules.

(a) Accrued benefit. For purposes of section 411 and the regulations thereunder, the term 'accrued benefit' means -

(1) Defined benefit plan. In the case of a defined benefit plan -

(i) If the plan provides an accrued benefit in the form of an annual benefit commencing at normal retirement age, such accrued benefit, or

(ii) If the plan does not provide an accured benefit in the form described in subdivision (i) of this subparagraph, an annual benefit commencing at normal retirement age which is the actuarial equivalent (determined under section 411(c)(3) and Sec. 1.411(c)-(5) of the accrued benefit determined under the plan. In general, the term 'accrued benefits' refers only to pension or retirement benefits. Consequently, accrued benefits do not include ancillary benefits not directly related to retirement benefits such as payment of medical expenses (or insurance premiums for such expenses), disability benefits not in excess of the qualified disability benefit (see section 411(a)(9) and paragraph (c)(3) of this section), life insurance benefits payable as a lump sum, incidental death benefits, current life insurance protection, or medical benefits described in section 401(h). For purposes of this paragraph a subsidized early retirement benefit which is provided by a plan is not taken into account, except to the extent of determining the normal retirement benefit under the plan (see section 411(a)(9) and paragraph (c) of this section). The accrued benefit includes any optional settlement at normal retirement age under actuarial assumptions no less favorable than those which would be applied if the employee were terminating his

employment at normal retirement age. The accrued benefit does not include any subsidized value in a joint and survivor annuity to the extent that the annual benefit of the joint and survivor annuity does not exceed the annual benefit of a single life annuity.

(2) Defined contribution plan. In the case of a defined contribution plan, the balance of the employee's account held under the plan.

... [¶]

(c) Normal retirement benefit -

(1) In general. For purposes of section 411 and the regulations thereunder, the term 'normal retirement benefit' means the periodic benefit under the plan commencing upon early retirement (if any) or at normal retirement age, whichever benefit is greater.

(2) Periodic benefit. For purposes of subparagraph (1) of this paragraph -

(i) In the case of a plan under which a benefit is payable as an annuity in the same form upon early retirement and at normal retirement age, the greater benefit is determined by comparing the amount of such annuity payments.

(ii) In the case of a plan under which an annuity benefit payable upon early retirement is not in the same form as an annuity benefit payable at normal retirement age, the greater benefit is determined by converting the annuity benefit payable upon early retirement age into the same form of annuity benefit as is payable at normal retirement age and by comparing the amount of the converted early retirement benefit payment with the amount of the normal retirement benefit payment.

(iii) In the case of a plan which is integrated with the Social Security Act or any other Federal or State law, the periodic benefit payable upon and after early retirement age is adjusted for any increases in such benefits occurring on or after early retirement age which are taken into account under the plan. See however, section 401(a)(15) and the regulations thereunder.

(3) Benefits included. For purposes of this paragraph, the normal retirement benefit under a plan shall be determined without regard to ancillary benefits not directly related to retirement benefits such as medical benefits or disability benefits not in excess of the qualified disability benefit; see section 411(a)(7) and paragraph (a)(1) of this section. For this purpose, a qualified disability benefit is a disability benefit which is not in excess of the amount of the benefit which would be payable to the participant if he separated from service at normal retirement age.

(4) Early retirement benefit; social security supplement.

(i) For purposes of this paragraph, the early retirement benefit under a plan shall be determined without regard to any social security supplement.

(ii) For purposes of this subparagraph, a social security supplement is a benefit for plan participants which -

(A) Commences before the age and terminates before the age when participants are entitled to old-age insurance benefits, unreduced on account of age, under title II of the Social Security Act, as amended (see section 202 (a) and (g) of such Act), and

(B) Does not exceed such old-age insurance benefit.

(5) Special limitation. If a defined benefit plan bases its normal retirement benefits on employee compensation, the compensation must reflect the compensation which would have been paid for a full year of participation within the meaning of section 411(b)(3). If an employee works less than a full year of participation, the compensation used to determine benefits under the plan for such year of participation must be multiplied by the ratio of the number of hours for a complete year of participation to the number of hours worked in such year. A plan whose benefit formula is computed on a computation base which cannot decrease is not required to adjust employee compensation in the manner described in the previous sentence. Thus, for example, if a plan provided a benefit based on an employee's compensation for his highest five consecutive years or a

separate benefit for each year of participation based on the employee's compensation for such year the plan would not have to so adjust compensation. However, if a plan provided a benefit based on an employee's compensation for the employee's last five years or the five highest consecutive years out of the last 10 years, the compensation, would have to be so adjusted. For special rules for applying the limitations on proration of a year of participation for benefit accrual, see regulations prescribed by the Secretary of Labor under 29 CFR Part 2530, relating to minimum standards for employee pension benefit plans.

(6) Examples. The provisions of this paragraph are illustrated by the following examples:

Example (1). Plan A provides for a benefit equal to 1% of high 5 years compensation for each year of service and a normal retirement age of 65. The plan also provides for a full unreduced accrued benefit without any actuarial reduction for any employee at age 55 with 30 years of service. Even though the actuarial value of the early retirement benefit could exceed the value of the benefit at the normal retirement age, the normal retirement benefit would not include the greater value of the early retirement benefit because actuarial subsidies are ignored.

Example (2). Plan B provides the following benefits: (1) at normal retirement age 65, $300/mo. for life and (2) at early retirement age 60, $400/mo. for life. The normal retirement benefit is $400/mo., the greater of the benefit payable at normal retirement age ($300) or early retirement ($400).

Example (3). Assume the same facts as example (2) except that the early retirement benefit of $400 is reduced to $300 upon attainment of age 65. If each employee's social security benefit at age 65 is not less than $100, the $100 would be considered to be a social security supplement and would therefore be ignored. Consequently, the normal retirement benefit would be $300.

Example (4). Plan C provides a benefit at normal retirement age equal to 1% per year of service, multiplied by the participant's compensation averaged over the 5 years immediately prior to retirement. An early retirement benefit is provided upon attainment of age 60 equal to the benefit accrued to date of early retirement reduced by 4 percent for each year by which the early retirement date precedes the normal retirement age of 65. Employee A was hired at age 30, participated immediately, and retired at age 65. Employee A's annual compensation was $50,000 between ages 55-60 and was reduced to $33,000 after age 60. The following table indicates the amount of annual benefit that would have been provided by the plan formula if the employee retired at or after age 60:

Age:	Final average computated: (1) -	Percent accrued benefit: (2) -	Reduction: (3) -	Annual benefit: (4) -
60	$50,000	30	0.80	$12,000
61	46,600	31	.84	12,135
62	43,200	32	.88	12,165
63	39,800	33	.92	12,083
64	36,400	34	.96	11,881
65	33,000	35	1.00	11,550

Note. - Col. (1) times col. (2) times col. (3) equals col. (4).

The normal retirement benefit is the greater of the benefit payable at normal retirement age or the early retirment benefit. Employee A's normal retirement benefit is $12,165, the greatest annual benefit Employee A would be entitled to.

APPENDIX G:
LEGISLATIVE HISTORY

Senate Report No. ("SR") 98-575, P.L. 98-397:, page 19 (U. S. Code, Congressional and Administrative News, v. 4, 98th Congress, 2nd Session, page 2565)

There is a divergence of opinion among the courts as to whether ERISA preempts State community property laws insofar as they relate to the rights of a married couple to benefits under a pension, etc., plan. [24]

[24] In *Stone v. Stone*, 633 F.2d 740 (9th Cir. 1980), the court held that ERISA was not intended to preempt community property laws and that a court order requiring a division of retirement benefits did not violate the anti-assignment provisions. In *Francis v. United Technology Corp.*, 458 F.Supp. 84 (N.D. Cal. 1978), however, the court held that ERISA's preemption provision prevents the application of State community property law permitting attachment of plan benefits for family support purposes.)

The IRS has ruled that the spendthrift provisions are not violated when a plan trustee complies with a court order requiring the distribution of benefits of a participant in pay status to the participant's spouse or child support obligations.[25] The IRS has not taken any position with respect to this issue in cases in which the participant's benefits are not in pay status.

[25]Rev. Rul. 80-27, 1980-1 C.B. 8.

...

Because rights created, recognized, or assigned by a qualified domestic relations order, and benefit payments pursuant to such an order, are specifically permitted under the bill, **State law providing for these rights and payments under a qualified domestic relations order will continue to be exempt from Federal preemption** under ERISA. Emphasis added, *id.*

House Report ("HR") 98-655, Part I, Retirement Equity Act of 1984, 98th Cong., 2d Sess.

The anti-assignment provision coupled with the preemption clause has created conflict between State interests in enforcing court orders... . The courts are divided on the question of whether the anti-assignment clause applies to State domestic relations orders and also on the question of whether the preemption clause refers to State domestic relations laws and court orders. Emphasis added, HR 98-655, p. 30.

A few courts have interpreted the **assignment and alienation provisions as prohibiting awarding a divorced spouse a share of a plan participant's pension benefits.** Emphasis added, *id.*

...

Presently, former spouses are not able to receive pension payments until payments have actually begun to be made to the participant. Moreover, **the participant may elect to defer receiving payments until the latest possible date.** In addition, because payment of the former spouse's benefit is coterminous with that of the participant, the **former spouse's payments end with the death of the participant.** Emphasis added, *id.*

...

[T]he general policy underlying the bill's provisions is that **the domestic relations court is the appropriate forum to balance the equities between the parties and settle all controversies.** Id., p. 39.

...

[T]he alternate payee can begin collecting at the plan's early retirement age pursuant to a court order ... regardless of whether the participant continues to work past early retirement age. *Id.*, p. 40.

...

The **maximum amount** that can be paid to the alternate payee is based on the present value of the amount the

participant would have received if he or she retired on the date on which the alternate payee started to collect (except in the case of death ...). Emphasis added,*Id.*

...

[T]he Committee's general policy [is] to rely on state court **procedures** in domestic relations matters... . Emphasis added,*Id.*, p. 41.

...

The Committee intends that plan administrators make every effort to assure that alternate payees receive the benefits which have been awarded them by the State domestic relations courts. Id., 42.

...

The bill also amends the preemption provisions (section 514) of ERISA to reflect the limited exception which is being provided to allow the **enforcement** of qualified domestic relations orders (as defined in the bill) against employee pension benefit plans. The inclusion of this specific exception reflects the Committee's judgment that ERISA's preemption rules should be amended to this limited extent in order to resolve the problems which have arisen in the domestic relations area. Emphasis added,*Id.*

Supreme Court, U.S.
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No. 97-1171

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

In re the Marriage of MARY K. and JAMES M. ODDINO

MARY K. ODDINO, Petitioner,

v.

JAMES M. ODDINO, Respondent;

HUGHES NON-BARGAINING RETIREMENT PLAN, Respondent.

On Petition for a Writ of Certiorari to The California Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Do California state courts have subject matter jurisdiction to decide whether a state domestic relations order assigning retirement benefits to the nonemployee spouse satisfies the requirements for qualification under Section 1056 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA")?

2. Does a domestic relations order qualify under ERISA § 1056(d)(3)(E)(i)(II) if it requires the retirement plan to pay the nonemployee spouse a portion of the employee spouse's early retirement benefits without any actuarial reduction, where the employee spouse is eligible for such unreduced benefits upon early retirement but has not yet retired?

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Senate Report No. 98-575, Reprinted in 1984 U.S. Code Cong. & Ad. News, Vol. 4, page 2567 20

STATEMENT OF THE CASE

Petitioner Mary K. Oddino has asked this Court to review three questions she perceives as arising from a decision of the California Supreme Court concerning the ERISA, codified at 29 U.S.C. Section 1001 *et seq.*[1] The California Supreme Court's decision addresses two discrete issues: (1) whether state courts have jurisdiction to determine whether a domestic relations order is qualified under ERISA § 1056 and (2) whether a domestic relations order that requires the payment of unreduced early retirement benefits to a nonemployee spouse when the employee spouse has not retired satisfies the requirements for qualification under Section 1056. The specific questions presented by Petitioner were not expressly discussed in the California Supreme Court's decision. Moreover, two of the questions presented by Petitioner do not exist under the facts of this case. As discussed in detail below, the California Supreme Court's decision does not conflict with any decision of another state supreme court or any federal court, and the Petition raises no basis that warrants review by this Court.

A. Facts Of The Case.

This case involves an incentive for early retirement offered through the Hughes Non-Bargaining Retirement Plan (the "Plan") to employees of Hughes Electronics Corporation ("Hughes"). Hughes is the successor to Hughes Aircraft Company as the sponsor and a funding source for the Plan. The Plan is a "defined benefit" plan, which means that the pension benefit for the life of the retiree is calculated on the basis of a fixed monthly amount. The assets of the Plan are

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[1] References to "ERISA" in this Opposition are to the provisions as codified in U.S. Code, Title 29.

held in a trust fund for all participants. No particular funds are set aside for any individual. ERISA requires that Hughes contribute to the Plan so that it is funded according to reasonable actuarial assumptions.[2] ERISA § 1082(c)(3). ERISA's funding requirements are established so "plans will accumulate assets within a reasonable time to pay benefits to covered employees when they retire." Conference Committee Report accompanying ERISA ("ERISA Conference Report"), H.R. Conf. Rep. No. 93-1280, 93rd Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 5038, 5064.

The Plan's normal rule is that if benefits commence before age 65, the monthly benefit is reduced from the level that would have been paid at age 65. The purpose for the reduction is to ensure that -- on average -- the overall cost of benefits for an early retiree is not more than the overall cost for an individual who retires at age 65. Without a reduction in the monthly benefit paid to an early retiree, the overall cost of benefits to an early retiree would be higher than for an employee who retires at age 65 because benefits paid to an early retiree commence sooner and are thus (on average) paid over a longer period.

Despite the general rule that monthly benefits are reduced for early retirees, Hughes, as sponsor of the Plan, designed the Plan to provide an incentive for early retirement for employees who retire after reaching at least age 55, with

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[2] For example, the amount needed in the pension trust depends upon assumptions about the dates participants retire, the investment return on trust assets, and the projected rate at which participant wages will increase. A professional actuary is required to develop assumptions about such events and calculate the required employer contributions so that a pension plan has funds when needed.

at least 20 years of service (or any combination of at least 55 years of age and years of service which totals at least 75). This early retirement incentive has been referred to as the "Rule of 75." If an employee qualifies under the Rule of 75, there is no reduction to the monthly benefit for early retirement. An employee who accepts the incentive to retire early will receive benefits that are much more valuable in the aggregate than the benefits for an employee who retires at age 65. This is because under the Rule of 75, an early retiree can begin receiving at age 55 the same monthly benefit as an individual who commences benefits at age 65. Since the monthly benefits for an employee who accepts the Rule of 75 inducement commence as early as age 55, and the amount of the monthly benefits are not reduced, the aggregate value of the benefit is much higher for the employee who accepts the early retirement inducement. The Rule of 75 provides a powerful inducement to retire early, and, of course, eligible employees must actually retire in order to receive the enchanced benefits. The actuarial assumptions used for determining Hughes' required Plan contributions must by law take into account the expected extent to which employees will accept Rule of 75 benefits by retiring early. Rev. Rul. 78-331, 1978-2 C.B. 158. Thus, the Plan is funded according to the expected rate at which the enhanced early retirement benefit will be paid to employees who actually retire.

Although the incentive offered by the Rule of 75 increases the cost to Hughes of funding the Plan through contributions, encouraging early retirement can satisfy Hughes' corporate goals by saving costs of the employee's continued employment, such as wages, insurance, and workers' compensation coverage. These costs can be saved if the retiring employee is not replaced at all or is replaced with a more junior employee at a lower salary.

Furthermore, encouraging early retirement can reduce the risk of litigation that could result from involuntary layoffs. This Court recently endorsed the use of early retirement inducements to obtain the *quid pro quo* of actual retirement. *Lockheed Corp. v. Spink*, __ U.S. __, 116 S. Ct. 1783, 1791-92, 135 L. Ed. 2d 153 (1996).

James M. Oddino was a Hughes employee and a Plan participant during the relevant time period. On March 24, 1989, the California Superior Court, County of Los Angeles entered a "Stipulation and Order Re Modification of Interlocutory Judgment and Qualified Domestic Relations Order" (the "Order"). (Pet. App. 41.)[3] Pursuant to the Order, the Superior Court awarded Petitioner 36.6231% of the benefit earned by James Oddino through April 1, 1988, and it directed that the Plan make payments directly to Petitioner. (Pet. App. 42.) The Order provided that payments were to commence April 1, 1988, "or as soon thereafter as practical." On approximately April 5, 1989, Hughes, the Plan administrator, received the Order. Hughes determined that the Order constituted a "qualified domestic relations order" as defined in ERISA § 1056(d)(3) (a "QDRO")[4], and commenced payments to Petitioner in

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[3] "Pet. App. 41" refers to page 41 of Petitioner's Appendix submitted with the Petition. Similar references will be made throughout this Opposition.

[4] ERISA § 1056 generally prohibits any alienation of a participant's benefits under a retirement plan. ERISA § 1056(d) provides an exception to the anti-alienation provision for a domestic relations order declaring the ownership rights of a divorcing spouse if the plan administrator determines that such order satisfies all of the requirements of Section 1056(d). If the plan administrator determines that the order satisfies the requirements of Section 1056(d), the order becomes a "qualified domestic relations order" or "QDRO."

March, 1990. Hughes' determination that the Order was a QDRO was premised upon its understanding that the Order did not require payment of the Rule of 75 enhanced early retirement benefit because the participant, James Oddino, remained employed by Hughes. Hughes also determined that if the Order required payment of the Rule of 75 benefit prior to James Oddino's actual retirement, the Order **would not** qualify as a QDRO.

On March 31, 1990, Petitioner joined the Plan as a party to the dissolution proceeding. Pursuant to an order to show cause, Petitioner requested that the Superior Court order the Plan to pay her share of benefits based upon the Rule of 75, notwithstanding James Oddino's continued employment. The Superior Court correctly upheld Hughes' determination that the Order did not require benefits based upon the Rule of 75, and it refused to order payment of the Rule of 75 benefit. (Pet. App. 38.) The California Court of Appeal reversed. Notwithstanding the fact that James Oddino had not retired early, it held that the Rule of 75 early retirement benefit should be paid to Petitioner. (Pet. App. 27-36.)

The California Supreme Court granted review and reversed the California Court of Appeal.[5] The California Supreme Court considered two questions. First, do California courts have subject matter jurisdiction to determine whether a state court domestic relations order assigning retirement plan benefits is a QDRO? The California Supreme Court ruled that ERISA § 1132(e)(1), which provides for concurrent state and federal jurisdiction

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[5] The grant of review by the California Supreme Court and its reversal of the California Court of Appeal's decision caused the California Court of Appeal's decision to be vacated.

over claims arising under ERISA § 1132(a)(1)(B), provides jurisdiction for state courts to determine whether domestic relations orders are QDROs. (Pet. App. 16.) Second, does an order qualify as a QDRO if it requires the retirement plan to pay the nonemployee spouse a portion of the employee spouse's early retirement benefits without any actuarial reduction, where the employee spouse is eligible for such unreduced benefits upon early retirement but has not yet retired? The California Supreme Court ruled that an order requiring such payments cannot be a QDRO under ERISA § 1056(d)(3)(E)(i)(II). (Pet. App. 18-19.)

B. Correction Of Misstatements In The Petition.

Rule 15.2 of the Rules of the Supreme Court of the United States provides:

> "In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in a petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition."

The Petition contains numerous misstatements of fact that are unsupported by the record below as well as misstatements of the proceedings below.

1. Misstatements Of The Factual Record Below.

At page 3, footnote 1, Petitioner purports to set out statistics concerning the assets and liabilities of the Plan and other plans. The statistics are not part of the record below. Moreover, Petitioner states that the assets of the Plan exceed its liabilities by an amount in excess of $5 billion, but the liability amount she refers to does not include the Plan's liabilities for benefits owed to participants and beneficiaries.

At page 3, footnote 2, Petitioner purports to describe certain aspects of defined benefit plans in general, as well as the Plan. Although the Plan does not endorse Petitioner's general description, the disagreement with her general description is probably immaterial. However, footnote 2 incorrectly states that the Plan contains a "normal retirement age benefit." Petitioner attempts to distinguish this "normal retirement age benefit" from the Plan's Normal Retirement Benefit. The Plan has a Normal Retirement Benefit which commences at age 65. The concept of a "normal retirement age benefit," as distinct from the Normal Retirement Benefit, does not exist in the Plan. (Supp. C.T. at 33.)[6]

At pages 3 and 4, the Petition incorrectly states that the Plan confirmed that Petitioner would receive a certain amount of monthly benefits. The Plan prepared estimates of

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[6] "Supp. C.T. at 33" refers to page 33 of the Supplemental Clerk's Transcript in the proceedings below.

benefits at the request of James Oddino. (II C.T. at 261.)[7] He asked the Plan's administrator to provide an estimate of the benefit he would receive if he retired on April 1, 1988. He also asked the Plan's administrator to include an estimate of Petitioner's share of those benefits. Both estimates were provided to James Oddino. He apparently gave Petitioner the estimate referring to her share of his benefit. The estimate referring to Petitioner's share of James Oddino's benefit was not an estimate of the benefit Petitioner would receive if she commenced payment under a QDRO prior to the time James Oddino retired. The Superior Court's factual findings are consistent with this. The Superior Court found that the estimate of benefits payable was requested by James Oddino rather than Petitioner, and that the Plan did not know when James Oddino would retire. (Pet. App. 37-38).

At page 4, the Petition states that on April 1, 1988, James Oddino had earned the Plan's early retirement benefit under the Rule of 75. At that time, James Oddino had sufficient age and service to be entitled to retire and receive the Rule of 75 benefit. However, he had not earned the benefit as of that date because he had not retired.

At page 4, footnote 4, the Petition incorrectly states that the "plan determines the [Early Retirement Benefit (the "ERB")] as of the actual or assumed date of separation and it may be paid later actuarially increased." The ERB may only be paid upon actual separation, not on an assumed date of separation. If a participant has satisfied the age and service requirements for early retirement under the Rule of 75, actuarial increases are not provided for delayed retirement. (Supp. C.T. at 47.) Footnote 4 also incorrectly

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[7] "II C.T. at 261" refers to Volume II, page 261 of the Clerk's Transcript in the proceedings below.

states that the "ERB annuity is the same as the annuity in the Accrued Benefit also determined on the date of separation." Under the Plan, the ERB does not constitute the Accrued Benefit. Footnote 4 also incorrectly states that the "Plan has no provision to pay the Accrued Benefit except as an ERB per the Rule of 75." Under the Plan, a participant's Accrued Benefit is the Normal Retirement Benefit earned by a participant. The benefit under the Plan is paid as a Normal Retirement Benefit if the participant retires at age 65, or a Late Retirement Benefit if the participant retires after age 65. If a participant retries early after satisfying the conditions for the Rule of 75 benefit, the benefit is paid as the Rule of 75 benefit. If a participant who had not satisfied the age and service requirements for the Rule of 75 retires early, the participant is entitled to an actuarially-reduced early retirement benefit. (Supp. C.T. at 44-49.)

At pages 4 and 5, the Petition misstates the substance of correspondence between Hughes and Petitioner's representatives. The substance of the correspondence was whether the Plan's Rule of 75 benefit constituted a subsidy that could not be paid under a QDRO prior to a participant's actual retirement. (II C.T. at 237.)

Footnote 5 of the Petition incorrectly states that the "assumption of actual retirement is in both the Plan and ERISA." Neither the Plan nor ERISA contains such an assumption. Footnote 5 further incorrectly states that the Plan has three normal retirement benefits. The Plan has only one normal retirement benefit, which is the benefit commencing at the Plan's normal retirement age of 65. The Plan does not contain the term "Normal Retirement Age Benefit." (Supp. C.T. at 44.) The term is apparently Petitioner's invention.

At page 5, the Petition incorrectly states that the Plan revealed that it had paid Petitioner a percentage of an actuarially-reduced "vested retirement benefit." Petitioner was assigned a portion of James Oddino's accrued normal retirement benefit, which was paid after actuarial reduction. The payment was not miscalculated, and the Plan did not say that the payment was miscalculated. (II C.T. at 368.)

At page 5, footnote 8, the Petition misstates certain aspects of the operation of the Plan and ERISA. The Plan does not, and is not required to, contain an "NRAB," as distinct from a normal retirement benefit. ERISA § 1054(b)(1) provides that a plan may satisfy any one of three methods of determining a participant's accrued benefit. The Petition refers only to one of those methods.

At page 6, the Petition incorrectly states that the Order's formula for payment required that Petitioner be paid a percentage of the Plan's early retirement benefit, and that payment of that benefit was authorized pursuant to ERISA. The Order required payment of a percentage of James Oddino's accrued benefit. (Pet. App. 42.) The extent to which ERISA authorizes the payment of early retirement benefits was the subject of the California Supreme Court's decision.

At page 6, the Petition incorrectly states that following the grant of a rehearing in the California Court of Appeal, the Plan retracted its determination that the domestic relations order was a QDRO. The Plan's position has been consistent throughout this litigation: If the Order is interpreted to require payment of the Rule of 75 benefit, it can not be a QDRO. If the Order does not require payment of the Rule of 75 benefit, it is a QDRO. (Supp. C.T. at 13.)

At page 9, footnote 17, the Petitioner implies that Section 4.2(c) of the Plan refers to more than one normal retirement benefit. The actual reference is to the Plan's normal, early and late retirement benefits. (Supp. C.T. at 45.)

2. Misstatements As To The Proceedings Below.

In an attempt to manufacture issues, the Petition also contains numerous misstatements as to the proceedings below.

At page 5, the Petition states that the California Superior Court found that the QDRO constituted a waiver of Petitioner's rights to an order for the balance of her payments from James Oddino. The court actually stated as follows: "Pursuant to the stipulation of the Petitioner and the Respondent [James Oddino] the Court did not rule on Petitioner's request for relief against Respondent." (Pet. App. 39.) No mention of a waiver (caused by the QDRO or otherwise) was made.

At page 6, footnote 9, the Petition purports to find a federal question posed by the Superior Court as to whether the QDRO waived state claims against the employer or ex-spouse. No such question was posed by the Superior Court. (Pet. App. 37-39.)

At page 6, the Petition incorrectly states that the Superior Court did not rule on the effective date of Petitioner's payments. The Order provided that payments were to commence on April 1, 1988, or as soon thereafter as practical. The Superior Court ruled that the payments had not been unreasonably delayed. (Pet. App. 38.)

At page 6, the Petition incorrectly states that the United States Department of Labor sought review in the California Supreme Court. The Plan asked the California Supreme Court to review the case, and the California Employment Law Council (among others) urged the California Supreme Court to review the case. The Department of Labor allowed the Plan to inform the California Supreme Court that if review were granted, it would seek permission to participate as an amicus.

At page 7, the Petition incorrectly states that the California Supreme Court refused to consider the legislative history of the Retirement Equity Act and certain provisions of ERISA. Petitioner's briefs set forth her arguments concerning these provisions, and the California Supreme Court properly rejected her arguments.

At page 8, the Petition incorrectly states that the California Supreme Court "determined that every ERB contained a subsidy...." The California Supreme Court's decision contains no express statement to that effect, and the logic of the opinion does not compel that result. The California Supreme Court found that the specific early retirement benefit at issue (the Plan's Rule of 75) contained a subsidy. (Pet. App. 24.)

At pages 8-10, the Petition restates a number of the arguments Petitioner made before the California Supreme Court, all of which were properly rejected. These include an argument that the Rule of 75 cannot be an "employer subsidy for early retirement" under ERISA § 1056(d)(3)(E)(i)(II) because it is paid by the Plan, and

various arguments related to her theory that actual retirement is not required for payment of the Rule of 75 benefit.[8]

REASONS FOR DENYING THE PETITION

I. THE PETITION RAISES NO JURISDICTIONAL ISSUE THAT WARRANTS REVIEW BY THIS COURT.

The jurisdictional issue before the California Supreme Court was whether California courts have jurisdiction to determine whether domestic relations orders dividing ERISA retirement plan benefits satisfy the qualification requirements of federal law. As set forth in its decision, the California Supreme Court held that actions to determine the qualified status of a domestic relations order arise under ERISA § 1132(a)(1)(B) and, therefore, state courts have concurrent jurisdiction under ERISA § 1132(e)(1) to make such determinations. (Pet. App. 16.) As discussed below, the jurisdictional issues that the Petition attempts to raise result from a tortured reading of ERISA that the California Supreme Court correctly rejected. Accordingly, the Petition should be denied.

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[8] The Plan disagrees with the arguments and characterizations of the California Supreme Court's decision set forth on pages 8-10. One particular disagreement is worth pointing out. The Petition incorrectly states that requiring actual retirement as a precondition of receipt of the Rule of 75 benefit is an "inferred quid pro quo, admittedly an unwritten benefit to the employer sponsor...." The written terms of Plan expressly require retirement as a condition of payment of the Rule of 75 benefit, and the Plan has not admitted otherwise. (Supp. C.T. at 48.)

A. There Is No Standing Issue In This Case.

Petitioner first contends that a writ of certiorari should be granted because of a purported standing issue. Petitioner incorrectly contends that while the California Supreme Court held that state courts have concurrent jurisdiction to require a domestic relations order to be treated as a QDRO, she would have no standing to assert a claim until the plan administrator has determined that the domestic relations order is a QDRO. In essence, Petitioner contends that because Congress granted beneficiary status to alternate payees under QDROs, it necessarily denied putative alternate payees under domestic relations orders standing under ERISA to seek qualification of their orders. Thus, Petitioner asks this Court to consider whether the California Supreme Court's decision "violate[s] the statutory denial of beneficiary status" to putative alternate payees under ERISA § 1056(d)(3)(J). (Pet. at i.) As discussed below, there is no standing issue in this case concerning Petitioner specifically or concerning putative alternate payees generally.

ERISA § 1056(d)(3)(J) provides that an alternate payee under a QDRO is treated as a beneficiary under ERISA. A beneficiary may bring a number of causes of action under ERISA, including an action under Section 1132(a)(1)(B). Petitioner incorrectly assumes that if the plan administrator has not recognized her domestic relations order as a QDRO, and, therefore, has not recognized her as a beneficiary, she does not have standing to bring an action under ERISA to attempt to prove that she is a beneficiary. Petitioner is wrong because she does not need to prove status as a beneficiary to have standing, she merely needs a colorable claim of beneficiary status. This Court has already addressed a similar issue as it related to the term "participant." *Firestone Tire & Rubber Co. v. Bruch,* 489

U.S. 101, 117, 109 S. Ct. 948, 958, 103 L. Ed. 2d 80 (1989). In *Firestone*, this Court held that a person has standing as a participant if he or she has a "colorable claim" to vested benefits. 489 U.S. 117, 109 S. Ct. 958. The claimant may show that he or she "may become eligible" for benefits by making a colorable claim that eligibility requirements will be fulfilled in the future. *Id.* Clearly, upon the issuance of a domestic relations order that conforms to the requirements of Section 1056, Petitioner, and other alternate payees, may become eligible for benefits as a beneficiary. It is absurd to contend that a spouse with a colorable claim to benefits as an alternate payee under a domestic relations order would have no standing to seek to have the domestic relations order qualified. The California Supreme Court's decision is consistent with the *Firestone* holding concerning standing, and it does not conflict with any other reported decision. Thus, the California Supreme Court's decision raises no standing issue that warrants review by this Court.

B. ERISA's Preemption Clause Does Not Supplant Its Jurisdiction Provisions.

The Petition also contends that review by this Court is warranted based upon a contention that ERISA § 1144 means something different than exactly what it says. In essence, Petitioner contends that ERISA's preemption clause supplants its jurisdiction clause, and, thus, ERISA's enforcement section does not apply at all to this case. (Pet. at 14.) The California Supreme Court correctly rejected Petitioner's illogical and unsupported contention.

ERISA's preemption clause states that the provisions of ERISA "supersede any and all State laws [that] relate to any employee benefit plan . . .." ERISA § 1144(a). "State

laws" under the preemption clause include all decisions or other State action having the effect of law. ERISA § 1144(c)(1). However, the preemption clause further states that it "shall not apply to **qualified domestic relations orders** . . .." ERISA § 1144(b)(7) (emphasis added). The preemption exemption for QDROs in Section 1144(b)(7) means no more than what it says -- qualified domestic relations orders, even though they are state decisions having the effect of law, are not subject to a preemption defense. The preemption exemption says nothing about jurisdiction. In an incredible leap of logic, Petitioner contends that the preemption exemption for QDROs should be read so broadly as to supplant ERISA's express jurisdiction provision. In her view, Section 1144(b)(7) exempts from preemption all state laws "relating to" domestic relations orders, including jurisdictional laws.

Petitioner's argument stems from the fact that QDROs are exempted from both the anti-alienation and preemption provisions of ERISA. ERISA §§ 1056(d)(3) and 1144(b)(7). Petitioner incorrectly perceives a significant overlap between the preemption and anti-alienation provisions because she incorrectly believes that Section 1056 and Section 1144 are both preemption provisions.[9] In her view, any overlap in the preemption and anti-alienation exemptions for QDROs must be eliminated by dramatically expanding the preemption exemption. This Court has concluded that any overlap between the preemption and anti-

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[9] Petitioner misapprehends the difference between ERISA's preemption clause and ERISA's substantive plan regulation. Section 1056 is not a preemption provision. Section 1056 regulates the alienation of pension benefits, and it applies regardless of whether state or federal law is the basis for alienation. Section 1144 addresses the preemption of state laws by virtue of ERISA's legislative scheme as a whole.

alienation exemptions exists merely because Congress wanted to ensure that ERISA's preemption of state laws could not be used to render a QDRO void. *Mackey v. Lanier Collection Agency*, 486 U.S. 825, 837, 108 S. Ct. 2182, 2190, 100 L. Ed. 2d 836 (1988).[10] Petitioner contends that *Mackey* somehow illustrates a tension between ERISA's pre-emption and anti-alienation provisions that should be resolved by finding that ERISA's enforcement scheme has no application in determining whether a domestic relations order is qualified. There was no jurisdictional issue in *Mackey*; and *Mackey* is not authority to supplant ERISA's express jurisdiction provision.

In *Boggs v. Boggs*, ___ U.S. ___, 117 S. Ct. 1754, ___L. Ed. 3d ___ (1997), this Court stated that "[a] domestic relations order must meet certain requirements to qualify as a QDRO. *See* §§ 1056(d)(3)(C)-(E)." 117 S. Ct. 1763. The substantive issue in this case involves interpretation of these very provisions regulating the qualification of domestic relations orders. There is no indication in *Boggs* or any other federal court decision that ERISA's enforcement scheme under Section 1132 has no part in determining whether such requirements have been met. The California Supreme Court held that ERISA's benefit claim enforcement mechanism (Section 1132(a)(1)(B)) is available to alternate payees seeking qualification of a domestic relations order. Such holding does not conflict with any decision of this Court or any other reported decision. Thus, the Petition does not raise any jurisdictional issue that warrants review by this Court.

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[10] The *Mackey* majority expressly stated that some overlap may occur in the preemption area given that provisions of the preemption clause were enacted at different times in response to judicial decisions that "were not of Congress' liking." *Id.*, 486 U.S. at 837 n.14. -

II. NO ISSUE REGARDING THE TREATMENT OF EARLY RETIREMENT BENEFITS WARRANTS REVIEW.

Petitioner's second question presented for review was not explicitly considered by the California Supreme Court. As explained below, although Petitioner raised the issue as one of her arguments before the California Supreme Court, it does not arise under the facts of this case.

Petitioner's second question implies that the California Supreme Court's decision prohibits a QDRO from determining benefits by "referencing" an early retirement benefit. The decision, however, did not consider whether a **reference** to an early retirement benefit would make a domestic relations order ineligible for QDRO status. Instead, the California Supreme Court considered whether the Plan's Rule of 75 early retirement benefit may be **paid** under a QDRO before the participant retires. The California Supreme Court appropriately held that such benefit may not be paid under a QDRO before the participant retires.

The question that Petitioner seeks to have this Court decide can best be understood in the context of the question the California Supreme Court actually decided. Subsection (A) below discusses the issue decided by the California Supreme Court, and subsection (B) below discusses the issue raised by Petitioner.

A. ERISA And Its Legislative History Limit The Value Of Payments That May Be Distributed Before The Employee Spouse's Retirement.

In general, ERISA prohibits the assignment or alienation of retirement benefits. An exception is made for payments to an "alternate payee" (*e.g.*, Petitioner) under a QDRO. ERISA §§ 1056(d)(1) and 1056(d)(3). An order cannot be a QDRO if it requires "a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan." ERISA § 1056(d)(3)(D)(i). Normally, of course, benefit payments cannot start before the participant actually retires, and an order that requires such payments would -- but for a limited exception that was at the core of the California Supreme Court's decision -- violate the prohibition against benefits not otherwise provided in the plan. The critical exception at issue below relates to certain permissible payments made to an alternate payee after a participant has reached the "earliest retirement age." ERISA § 1056(d)(3)(E)(i). It is this earliest retirement age exception that permits **limited** payments to be made to Petitioner under a QDRO while James Oddino remained employed.[11]

The earliest retirement age exception contains an explicit rule stating how Petitioner's benefit must be calculated. Payments made to an alternate payee prior to the

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[11] Section 1056(d)(3)(E)(i) provides that it is an exception to the prohibition contained in Section 1056(d)(3)(D)(i) against providing any "type or form of benefit, or any option, not otherwise provided under the plan." Thus, if a domestic relations order requires payment before retirement, and the requirements of Section 1056(d)(3)(E)(i) are not satisfied, then the order fails to satisfy Section 1056(d)(3)(D)(i) and is not a QDRO.

participant's actual retirement must be calculated "as if the participant had retired on the date on which such payment is to begin under [the QDRO] **(but taking into account only the present value of benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement).**" ERISA § 1056(d)(3)(E)(i)(II) (emphasis added). Under this provision, an order that requires payment of an "employer subsidy for early retirement" prior to actual retirement cannot be a QDRO. The Senate Report concerning the Retirement Equity Act of 1984 ("REA") (the "Senate Report") sets forth how a calculation involving payments before retirement must be made:

> "When payments are made to an alternate payee before the participant retires, the payments are computed by taking into account only benefits actually accrued and not taking into account any employer subsidy for early retirement. The amount to be paid to the alternate payee is to be calculated by using the participant's **normal retirement benefit accrued as of the date payout begins and by actuarially reducing such benefit. . . .**" Senate Report No. 98-575, Reprinted in 1984 U.S. Code Cong. & Ad. News, Vol. 4, page 2567 (emphasis added).

The substantive dispute before the California Supreme Court was whether a QDRO could require payment of early retirement benefits under the Rule of 75 without the actuarial reduction described in the Senate Report. The California Supreme Court correctly held that the Rule of 75 early retirement benefit is an "employer subsidy for early retirement" that may not be paid under a QDRO prior to the

retirement of the Plan participant. The reasoning of the California Supreme Court is set forth at Petitioner's Appendix 17-26. The California Supreme Court's reasoning is sound, and its decision does not conflict with any other reported decision.

B. Petitioner's Question Presented Is Not Appropriate for Review.

The California Supreme Court considered the issue of whether a QDRO may require payment of the Rule of 75 benefit before a participant actually retires. Petitioner asks this Court to consider the much broader question of whether ERISA prohibits a QDRO from "referencing" an early retirement benefit. As explained below, the question presented by Petitioner does not arise under the facts of this case, was not addressed explicitly or implicitly by the California Supreme Court, and is therefore not an appropriate subject for review.

Although Petitioner does not thoroughly explain the theory behind the question she is presenting, the Plan believes the question is based upon an insupportable interpretation of the Order.[12] For the question presented by Petitioner to arise, the Order must be interpreted as containing only a "reference" to the Rule of 75 benefit, without requiring it to be paid. In this case, the Order awarded Petitioner a precisely specified percentage (36.6231%) of James Oddino's accrued benefit under the Plan. As explained below, Petitioner's interpretation of the

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[12] The Plan's belief concerning the issue presented by Petitioner is based upon similar arguments she presented to the California Supreme Court.

Order would assign Petitioner **much more** than the precise percentage of James Oddino's accrued benefit specified.

Petitioner apparently would treat the percentage specified in the Order as a **reference** to the Plan's Rule of 75 benefit. The following mathematical steps would then be applied to avoid **payment** of the Rule of 75 benefit. First, determine the dollar amount that would be awarded to Petitioner if she were to be awarded 36.6231% of the Rule of 75 benefit, without an actuarial reduction. Second, determine the percentage of the normal retirement benefit that is necessary -- after actuarial reduction -- to result in a payment to Petitioner of the dollar amount that resulted from the first step.[13] This larger percentage of the participant's benefit would be assigned to the Petitioner. The result would be to provide benefit payments commencing early to the alternate payee equal to the sought-after percentage of the early retirement benefit that would have been available if the participant had retired. At the same time, the benefit remaining for the participant would be reduced by a much greater percentage than the 36.6231% set forth in the Order.

The California Supreme Court did not address orders requiring the calculation described above, and nothing

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[13] The amount of the normal retirement benefit to be awarded to the alternate payee under this calculation would be determined by dividing the dollar amount determined in step 1 by the actuarial reduction for early commencement described in the Senate Report. Thus, for example, assume that the dollar amount determined under step 1 is $1,000 per month. The actuarial reduction factor in this case, based upon James Oddino's age at the time benefit payments to Petitioner commenced, was .4322. Thus, in order to provide for a benefit payment of $1,000 per month to the alternate payee commencing early, the alternate payee would be awarded $2,314 of the participant's normal retirement benefit.

expressly set forth in its decision would prevent an order requiring such a calculation. The Order at issue in this case, however, cannot reasonably be interpreted as requiring the calculation described above. Thus, the question presented by Petitioner does not arise in this case.[14]

C. Petitioner's Other Theories Do Not Warrant Review.

Petitioner attempts to attack the California Supreme Court's decision on a number of grounds, but, as explained below, she fails to present an issue that warrants review.

1. ERISA § 1054(g)(2) Is Not Implicated.

Petitioner incorrectly argues that the California Supreme Court's decision conflicts with ERISA § 1054(g)(2). (Pet. at 13.) Section 1054(g)(2) is not implicated by this case. Section 1054(g) prohibits plan amendments that eliminate or reduce early retirement benefits or "retirement-type subsidies." There is no amendment at issue in this case, and for that reason, Section 1054(g)(2) is not implicated.

The issue before the California Supreme Court was whether the Rule of 75 benefit constituted an "employer subsidy for early retirement" under ERISA § 1056(d)(3)(E)(i)(II) which could not be paid under a QDRO prior to a participant's actual retirement. The fact that a plan amendment was not involved is sufficient to conclude that the decision could not conflict with Section

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[14] The question presented by Petitioner has not been considered in any reported state or federal decision.

1054(g)(2). Furthermore, whether or not an early retirement benefit is considered subsidized under Section 1056(d)(3)(E)(i)(II), the benefit may not be eliminated or reduced by an amendment because of the prohibition of Section 1054(g)(2). The only reference to Section 1054(g)(2) in the decision is to note that it "prohibits amendment of a plan to eliminate an early retirement benefit or 'retirement-type subsidy.'" (Pet. App. 19.) The reference was made because the legislative history of REA defines "subsidy" for purposes of Section 1054(g)(2). The California Supreme Court's decision cannot, however, be read as constituting a holding under Section 1054(g)(2).

Several cases have considered whether early retirement benefits constitute "accrued benefits" under ERISA. The pre-REA version of Section 1054(g) prohibited plan amendments that reduced or eliminated accrued benefits. Most of the cases considering pre-REA law concluded that early retirement benefits were not accrued benefits.[15]

REA made the plan amendment cases obsolete by adding ERISA § 1054(g)(2), which provides that a plan amendment that eliminates or reduces an early retirement benefit is treated as an amendment reducing accrued benefits. Section 1054(g)(2) is limited by its own terms; it expressly

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[15] The appellate cases holding that early retirement benefits are not accrued benefits are *American Stores v. American Stores Retirement Plan*, 928 F. 2d 986 (9th Cir. 1991); *Tilley v. Mead Corporation*, 927 F. 2d 756 (4th Cir. 1991)(cert. denied 1992); and *Bencivenga v. Western Pennsylvania Teamsters and Employees Pension Fund*, 763 F. 2d 574 (3d Cir. 1985). The only appellate case holding to the contrary was *Amato v. Western Union International, Inc.*, 773 F.2d 1402 (2d Cir. 1985)(cert. dismissed *sub non*, *Western Union International v. Amato*, 474 U.S. 1113 (1986)(memorandum decision)).

applies **only** for purposes of Section 1054(g)(1), which contains ERISA's rule prohibiting amendments that reduce or eliminate accrued benefits. Petitioner ignores the limiting language of Section 1054(g)(2) and contends that the effect of Section 1054(g)(2) is to treat early retirement benefits as accrued benefits for purposes of the QDRO rule set forth in Section 1056(d)(3)(E)(i)(II). The treatment of early retirement benefits for QDRO purposes is governed by Section 1056(d)(3)(E)(i)(II), which prohibits payment of subsidized early retirement benefits prior to the participant's retirement. The pre-REA cases cited by Petitioner involve amendments, not QDROs or Section 1056. Thus, the California Supreme Court's decision that the Rule 75 benefit is an employer subsidy under Section 1056 does not conflict with any statutory or case authority.

2. Petitioner Erroneously Contends That ERISA's QDRO Subsidy Provision Does Not Apply To Plans.

QDRO payments prior to actual retirement may not take into account "the present value of any employer subsidy for early retirement." ERISA § 1056(d)(3)(E)(i)(II). Petitioner argues that this provision does not apply to benefits paid from a plan. In her view such benefits are not an "employer" subsidy. (Pet. at 12.)

Petitioner's assertion is simply incorrect. ERISA § 1056 **only** applies to payments from plans. The passage from the Senate Report that describes the required calculation of benefits under a QDRO prior to actual retirement clearly refers to an actuarial reduction of benefits payable from a plan. Furthermore, the language of Section 1056 itself demonstrates that Petitioner's argument is incorrect. Section 1056 restricts payments at early

retirement to the "present value of benefits actually accrued," and states that for purposes of applying this rule, "the interest rate assumption used in determining the present value shall be the interest rate **in the plan**. . . ." ERISA § 1056(d)(3)(E)(i)(II)(emphasis added). There is no reason to refer to a present value calculation under a plan if the reference is to payments other than by a plan.

It is not surprising that Congress used the term "employer subsidy for early retirement" to refer to early retirement benefits, such as the Rule of 75, that are payable from plan assets. Hughes, the employer and Plan sponsor, establishes the subsidy and pays for the subsidy through its contributions to the Plan.

3. Petitioner Overstates The Breadth Of The California Supreme Court's Decision.

ERISA § 1056(d)(3)(E)(i)(II) prohibits the payment of employer subsidized early retirement benefits under a QDRO prior to the participant's actual retirement. *See* discussion at pp. 19-21, *supra*. Petitioner erroneously contends that the California Supreme Court found that there was an employer subsidy in every early retirement benefit. The implication of Petitioner's contention is that the California Supreme Court's decision would prohibit payment of any early retirement benefit under a QDRO before actual retirement. She offers no explanation or citation for this overbroad assertion, which cannot be found in the decision. The decision expressly considered only the Plan's Rule of 75 benefit. The California Supreme Court properly held that the Rule of 75 benefit was subsidized because it has an actuarial value in excess of the Plan's normal retirement benefit, and, therefore, it could not be paid to Petitioner before James Oddino's actual retirement. (Pet. App. at 19.)

Under the logic of the decision, an early retirement benefit that has an actuarial value equal to the normal retirement benefit would not be considered subsidized and, therefore, could be paid under a QDRO before actual retirement.

4. Petitioner Incorrectly States That Actual Retirement Is Not Required For Payment Of The Rule Of 75 Benefit Under The Plan.

Petitioner attacks the California Supreme Court's citation of this Court's recent opinion in *Lockheed v. Spink* on the incorrect ground that the Plan does not require retirement as a prerequisite for payment of the Rule of 75 benefit. The Plan explicitly requires retirement as a prerequisite for payment of any early or normal retirement benefits. The QDRO rules under ERISA allow **limited** payments to an alternate payee prior to actual retirement, but those payments may not include subsidized early retirement benefits.

The subsidized early retirement benefit provided by the Rule of 75 is a clear example of the sort of *quid pro quo* that this Court recognized in *Lockheed* were inherent in employee benefit plans. Simply put: in order to obtain the valuable enhanced early retirement benefit under the Rule of 75, the employee must retire early.

III. NO ISSUE REGARDING RETROACTIVE PAYMENTS WARRANTS REVIEW.

Petitioner's third question concerns ERISA § 1056(d)(3)(H). She incorrectly reads this provision as entitling her to retroactive payments. The California Supreme Court's decision did not expressly consider this

issue. This was appropriate because the Order does not provide for retroactive payments (or, indeed, for payments governed by Section 1056(d)(3)(H)).

The Order was issued March 24, 1989, and was served upon the Plan shortly thereafter. The Order provided that payments to Petitioner were to commence "as of April 1, 1988 **or as soon thereafter as practical.**" (Emphasis added.) (Pet. App. 42.) Petitioner reads this provision as entitling her to payments commencing on April 1, 1988, almost a full year **before** the Order was issued. In other words, she reads the Order as if the emphasized provision did not exist.

Payments under the Order commenced in early 1990 which, under the circumstances, was as soon as practical. The Superior Court made the following findings and rulings concerning the timing of the commencement of benefit payments:

> "The [Plan] did not take an unreasonable amount of time to approve the Qualified Domestic Relations Order and to commence payments under the Qualified Domestic Relations Order. The payments under the Qualified Domestic Relations Order were in an amount sufficient to recompense Petitioner for the period of time prior to commencement of such payments." (Pet. App. 38.)

Section 1056(d)(3)(H) provides that the plan administrator is to separately account for amounts that would have been payable to an alternate payee during a period (up to 18 months) in which the issue of whether a domestic relations order is qualified is being determined. Petitioner

believes that the 18-month period should commence April 1, 1988 -- almost 12 months prior to the time the domestic relations order was even issued. She simply overlooks the description of the 18-month period which is set forth in the statute itself:

> "For purposes of this sub-paragraph, the 18-month period described in this clause is the 18-month period **beginning with the date on which the first payment would be required to be made under the domestic relations order.**" ERISA § 1056(d)(3)(H)(v) (emphasis added).

The Order does not require payments to commence as of April 1, 1988. Instead, it requires payments to commence "as soon thereafter as practical." Obviously, it could not have been "practical" for payments to commence prior to the date the Order was issued and served upon the Plan. Furthermore, even after the Order was issued and served, no payments were required until it was practical to make them. The separate accounting required under Section 1056(d)(3)(H), does not start until the first payments are required under the terms of the Order. The Superior Court that issued the Order determined explicitly that the Plan did not take an unreasonable amount of time to approve the Order and commence payments thereunder. As a result, there were no amounts required to be separately accounted for, and the issue Petitioner seeks to bring before the Court does not exist in this case.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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February 10, 1998

APPENDIX

APPENDIX A: STATUTES

Selected provisions of Employee Retirement Income Security Act of 1974, as amended.

29 U.S.C. § 1054. Benefit Accrual Requirements

(a) **Satisfaction of requirements by pension plans**

Each pension plan shall satisfy the requirements of subsection (b)(3) of this section, and-

(1) in the case of a defined benefit plan, shall satisfy the requirements of subsection (b)(1) of this section; and

(2) in the case of a defined contribution plan, shall satisfy the requirements of subsection (b)(2) of this section.

(b) **Enumeration of plan requirements**

(1)(A) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which each participant is entitled upon his separation from the service is not less than--

(i) 3 percent of the normal retirement benefit to which he would be entitled at the normal retirement age if he commenced participation at the earliest possible entry age under the plan and served continuously until

the earlier of age 65 or the normal retirement age specified under the plan, multiplied by

(ii) the number of years (not in excess of 33⅓ of his participation in the plan.

In the case of a plan providing retirement benefits based on compensation during any period, the normal retirement benefit to which a participant would be entitled shall be determined as if he continued to earn annually the average rate of compensation which he earned during consecutive years of service, not in excess of 10, for which his compensation was the highest. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(B) A defined benefit plan satisfies the requirements of this paragraph or a particular plan year if under the plan the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133⅓ percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year. For purposes of this subparagraph--

(i) any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years;

(ii) any change in an accrual rate which does not apply to any individual who is or could be a participant in the current year shall be disregarded;

(iii) the fact that benefits under the plan may be payable to certain employees before normal retirement age shall be disregarded; and

(iv) social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after the current year.

(C) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which any participant is entitled upon his separation from the service is not less than a fraction of the annual benefit commencing at normal retirement age to which he would be entitled under the plan as in effect on the date of his separation if he continued to earn annually until normal retirement age the same rate of compensation upon which his normal retirement benefit would be computed under the plan, determined as if he had attained normal retirement age on the date any such determination is made (but taking into account no more than the 10 years of service immediately preceding his separation from service). Such fraction shall be a fraction, not exceeding 1, the numerator of which is the total number of his years of participation in the plan (as of the date of his separation from the service) and the denominator of which is the total number of years he

would have participated in the plan if he separated from the service at the normal retirement age. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

. . .

29 U.S.C. § 1144. Other Laws

. . .

(c) **Definitions**

(1) The term "State Law" includes all laws, decisions, rules, regulations or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

Supreme Court, U.S.
FILED
MAR 3 1998
CLERK

(3)

No. 97-1171

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1997

In re the Marriage of MARY K.
and JAMES M. ODDINO

MARY K. ODDINO
Petitioner,

v.

JAMES M. ODDINO
Respondent;
HUGHES NON-BARGAINING RETIREMENT PLAN,
Respondent;

On Petition for a Writ of Certiorari to the California Supreme Court

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PETITIONER'S REPLY BRIEF

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QUESTIONS Presented

1. Does the opinion that an alternate payee who seeks to have her domestic relations order found qualified and enforced against a pension plan may only sue under the civil enforcement procedures for beneficiaries and participants at 29 U.S.C. §1132.

a) violate the statutory denial of beneficiary status to such alternate payees at §1056(d)(3)(J),

b) ignore the availability of all State law relating to Qualified Domestic Relations Orders ("QDROs") at §1144(b)(7), and

c) thwart the intent of Congress to rely on "State law providing for [QDRO] rights and payments", to apply "State court procedures" for the "enforcement of [QDROs]", and to assure that "the domestic relations court is the appropriate forum to ... settle all controversies"?

2. Is the opinion that 29 U.S.C. §1056(d)(3)(E)(i)(II) prohibits QDRO formulas for determining benefits from referencing an early retirement benefit invalid, and does it frustrate the intent of Congress that

a) a QDRO may order "all ... of the benefits payable with respect to a participant under a plan" per subparagraph (B)(i)(I),

b) a QDRO may express the amount to pay in any legible manner per subparagraph (C)(ii),

c) a QDRO provides access to early retirement benefits per subparagraph (E)(i)(I), and

d) any benefits paid early must be treated as accrued benefits, protected from any denial per §1054(g)(2)?

3. Does permitting payments under a QDRO without the segregated amount it ordered per 29 U.S.C. §1056(d)(3)(H) obstruct the intent of Congress that a QDRO may order payments retroactive to 18 months?

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PETITIONER'S REPLY BRIEF

I. DISCUSSION

MARY K ODDINO (GLASSMAN), (hereinafter "Petitioner" or "MARY") respectfully replies to the Brief in Opposition ("Response") the Respondent Claimant Hughes Aircraft Non-Bargaining Retirement Plan ("Claimant" or "Plan") filed February 12, 1998.

The Response wants this Court not to consider multiple misinterpretations of ERISA by *In re Marriage of Oddino* (1997) 16 Cal.4th 67 ("*Oddino II*"). At page 12, the Petition lists ten of these errors. They led California to wrong statutory conclusions adversely affecting thousands upon thousands of participants and beneficiaries in all ERISA-qualified, defined benefit pension plans. These individuals are actual and potential alternate payee pensioners who now face the loss of their benefits, plus their employee ex-spouses who may now be forced to retire early to meet their marital obligations.[1]

This Plan has over 70,000 participants and beneficiaries. It is but one of 46,000 defined benefit plans, covering abut 33 million workers in the United States. With divorce rates of 40% nation-wide, 13 million ex-spouses alone could be eligible for Qualified Domestic Relations Order ("QDRO") benefits from the accounts of a like number of workers. Both spouses, perhaps totaling 26 million participants and beneficiaries, need access to their assets held in pension plans. Those assets are a primary source of liquidity to settle marital rights and obligations, and to provide day to day living expenses for non-employee ex-spouses otherwise incapable of self-support.

MARY herself has struggled for a decade to receive her share of benefits wrongfully withheld from her: $130

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[1] "[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries". §1104(a)(1).

thousand in 1988 dollars. Under *Oddino II* today, the average alternate payee will lose about $6,000 per year for life. This class of vulnerable payees, predominantly female senior citizens with no significant earning capacity, lobby, or legal support group, numbers about 13 million. Their collective loss is about $78 billion annually.

A. The Petition Is Accurate, and the Alleged Errors Are Unsupported, Irrelevant and Wrong

Without support, Claimant alleges errors in Petition footnotes and MARY's statement of the case.[2] These attempts to impeach the Petition number nineteen. A full answer to these charges is beyond the scope of any Reply Brief. However, they concern tangential Plan provisions or irrelevant procedural background. Moreover, Claimant's charges are contradicted by both the record and the terms of its own Plan. Each subject statement is immediately supported at exact sites in the record.

B. ERISA Is Necessary and Sufficient To Settle the Questions Presented, Terms of the Plan Are Not in the Case.

The Response seeks to divert focus from the critical federal Questions Presented. Except for the alleged impeachment, Plan interpretation does not lie in this case.

1. The California Supreme Court Wrongly Decided the Amount a QDRO May Order by Misreading ERISA, Not the Plan

Oddino II reversed accurate framing of the issue:

> The Hughes Plan interpreted the QDRO by using the age 65 vested retirement benefit[3] which provided

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[2]The known imperfections in the Petition can be repaired with the following. Errata: References to 26 U.S.C. §1056 and 26 U.S.C. §1132 should read 29 U.S.C. The error occurs three times on page i; once in the Table of Authorities, page v; and once on page 2. The date of the signature on page 17 should read 1998.

[3]At Response p. 10, ¶1, Claimant denies using the vested benefit, and alleges the Petition errs to so state. In truth Claimant proves the fact at

> wife with monthly payments of $1,563.70[4]; use of the early retirement benefit of Rule of 75 would have provided her with monthly payments of $3,689.60 calculated commencing from April 1, 1988, plus any cost-of-living adjustments. The Hughes Plan ultimately commenced payment of wife's share of the benefits on March 1, 1990.
>
> We hold that the trial court erred in denying the order to show cause. The Rule of 75 early retirement was not a subsidy, the QDRO thus did not improperly require payment greater than the actuarial equivalent of the permissible retirement benefits, and the Rule of 75 benefit was an accrued benefit to which wife was entitled pursuant to the QDRO and ERISA. Emphasis added, *In re Marriage of Oddino* (1996) 48 Cal.App.4th 965, 969. ("*Oddino I*")

Oddino II first ignored MARY's request that her order be read as a fixed dollar amount (for $3,689.60) per 29 U.S.C. §1056(d)(3)(C)(ii)[5], compliance with which request would have resolved any §1056(d)(3)(E)(i)(II) controversy and rendered moot whether the benefit paid under the Rule of 75 is a subsidy, or even an employer subsidy. The facts in this case did not involve the maximum liability of the plan to pay under a QDRO. (Plan maximum liability is the participant's normal retirement benefit.) Instead, the dispute was the amount ordered paid to MARY. The California Supreme Court held

> [D]oes an order qualify as a QDRO if it requires the retirement plan to pay the nonemployee spouse a portion of the employee spouse's early retirement

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Clerk's Transcript, Vol. II, page 225.

[4]This sum is 36.6231% (the subject QDRO share) of $4,269.71. This understated liability of the Plan is still more than sufficient to pay MARY $3,689.60 without causing any prohibited cost increase. 29 U.S.C. §1056(d)(3)(D)(ii).

[5]Henceforth unless otherwise stated, all statutory citations are to Title 29, Labor, of the United States Code (29 U.S.C.).

> benefits without any actuarial reduction, where the employee spouse is eligible for such unreduced benefits upon early retirement but has not yet retired? We answer this question no: Such unreduced early retirement benefits include an employer subsidy for early retirement, which, under section 1056(d)(3)(E)(i)(II), may not be paid pursuant to a QDRO if the employee spouse has not separated from service. Emphasis added, *Oddino II* at 71.

From a false starting position, the California Supreme Court continued to misconstrue ERISA to find a QDRO could not order an amount expressed as a share of a particular benefit. Its reasoning does not rely on any peculiarity of plan terms. Rather by importing wrongly read definitions from ERISA into the Plan, *Oddino II* rewrites the intent of Congress.[6]

2. Since REA, ERISA Treats Plan Early Retirement Benefits as Accrued Benefits

Another wrong reason *Oddino II* created was to find an early benefit was not an accrued benefit. This rested on the residue of a blue pencil edit[7] of the statutory definition of accrued benefit. The residue is:

> A participant's "accrued benefit" is defined as an annual benefit commencing at normal retirement age, or as the "actuarial equivalent" of such a benefit. (§§1002(23), 1054(c)(3).) *Id.* at 83.

The origin of this edit is a mark-up of statutes as follows:

> [A participant's] ~~The term~~ "accrued benefit" [is defined as] ~~means [¶] (A) in the case of a defined benefit plan, the individual's accrued benefit~~

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[6]The intent was to open the marital purse of earned pension benefits to settle all domestic disputes. The Petition, Appendix G.

[7]"This 'blue pencil' method of statutory interpretation—omitting all words not part of the clauses deemed pertinent to the task at hand—impermissibly ignores the relevant context in which statutory language subsists. *Massachusetts Mut. Life Ins. v. Russell* (1985) 473 U.S. 134,141 [105 S.Ct. 3085].

~~determined under the plan and, except as provided in section 1054(c)(3) of this title, expressed in the form of~~ an annual benefit commencing at normal retirement age .... (§1002(23)) [or as] ~~For purposes of this section, in the case of any defined benefit plan, if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, ... the employee's accrued benefit, ... shall be~~ the ["]actuarial equivalent["] of such a benefit .... §1054(c)(3)

This write-out of the meaning §1002(23) is impermissible statutory construction. It is also contradicted by the implementing Treasury Regulation, 26 C.F.R. §1.411(a)-7(a) Accrued benefit. The California Supreme Court has found that the early retirement benefit ("ERB") is not an accrued benefit, impliedly because it provides payment early. That ruling applies to all ERBs in any plan that defines its ERB as a benefit beginning before normal retirement age. Furthermore, it ignored that ERISA requires both early retirement benefits and subsidies for early retirement be treated as accrued benefits.[8] §1054(g)(2).

3. No Plan's Early Retirement Benefit Can Be a Subsidy since It Is Actuarially Increased To Find the Normal Retirement Benefit ("NRB") of ERISA, the Excess of Which NRB Is a Subsidy

A further wrong reason *Oddino II* created was to find an early benefit a subsidy.[9] It said:

> Mary, like the Court of Appeal, relies on another paragraph of the Treasury regulation as supporting her position. Paragraph (c)(2)(ii) provides that if the early retirement annuity is not payable in the same "form" as the annuity payable on retirement at normal retirement

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[8] §1054(g)(2) applies to plan amendments, but since ERISA plans must be administered according to their terms, Petitioner asserts a plan may not act in a manner not permitted by amendment.

[9] "A subsidy [is] 'the excess of the value of a benefit over the actuarial equivalent of the normal retirement benefit.'" *Oddino II* at 83.

> age, the former must be converted to the same "form of annuity benefit" as the latter before determining which of the two is greater and therefore which is the normal retirement benefit. (26 C.F.R. §1.411(a)-7(c)(2)(ii) (1996).) Contrary to the position of Mary and the Court of Appeal, that paragraph does not require any actuarial increase in the early retirement benefit to account for its hypothetical deferral to normal retirement age; a difference in commencement time of annuity payments is not a difference in the form of annuity. *Id.*, p. 86, fn. 11.

Ignored is that elsewhere in ERISA commencement time governs whether an actuarial increase is required, for accrued benefits, for example per §1.411(a)-7(a), *supra.* The opinion overlooks that actuarial increases account for the time value of money[10]. The opinion supplies no criteria for making the deferral to normal retirement age (usually age 65), which the statute demands, and so renders that code meaningless. Hence, the opinion concludes the Rule of 75 benefit is more valuable than the normal retirement benefit (which it severely undervalued), and so the former must contain not only a subsidy, but by a California proclamation, an "employer subsidy"[11].

C. Subsidiary Federal Questions and the Questions Presented Warrant Review, but the Plan Terms Do Not

These few examples of errors in the court of last resort in California are subsidiary questions encompassed in the Petition Questions Presented. By themselves, they are sufficient, substantial questions of interpretation of federal law to warrant review. They are not reached in the minimized, incomplete questions the Response proposes.

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[10] Along with mortality statistics.

[11] The California Supreme Court refused to apply the statutory definitions of *plan* (§1002(3)) and *employer* (§1002(5)) to distinguish between the excluded "employer subsidy" and any offering under the terms of a plan. That Court simply declared that the subsidy it found in the Rule of 75 benefit was an employer subsidy.

Moreover, the terms of the Plan cannot supplant ERISA since "The Plan is a qualified pension plan which is intended to comply with ... the Employee Retirement Income Security Act of 1974" and "to comply with the requirements of ... the Retirement Equity Act of 1984". Plan, p. 1. That is not to say any conflict lies between ERISA and the Plan, but only between ERISA and Claimant's unsupported characterizations of the Plan it administers. The California Supreme Court erred with respect to ERISA well before it applied its conclusions to the subject Plan benefits. These issues will all be clear in the briefs on the merits.

The Response also argues that none of the three original Questions Presented warrants review. Claimant proposes substantive defenses which validate that each of MARY's Questions Presented is worthy of review. Claimant's position is that review is not warranted since it would prevail, which begs the Question of course. Yet, by refusing Review, the Court would decide the Questions against all MARYs.

II. CONCLUSION

This Court can not only correct the erroneous pension and jurisdiction conclusions *Oddino II* imports nationally, but also clarify the confusion that even a scrupulous pension plan creates in ignorance of the express intent of Congress in the Legislative History and codification of ERISA/REA. As Chief Justice Rehnquist has recently observed,

> If one examines the current offerings of the University of Virginia Law School, ... one sees that there are at least three courses offered just on the First Amendment to the United States Constitution. By contrast, there seems to be no course offering devoted to federal regulation of employer-employee benefit and retirement plans - an area of the law which is much less glamorous, receives much less media attention, but the ramifications of which have a far greater effect an the daily lives of people than do the nuances of First Amendment law. Surely practitioners are much more likely to have clients with pension and benefit plan problems than with separation of church and state problems. Keynote Address, Dedication of David A. Harrison III Law Grounds, UVA, November 8, 1997.

In the published opinions below, this Court is presented with opposite conclusions from readings of ERISA regarding QDRO amount and retroactivity. The Circuit Courts are also divided even as to whether an early retirement benefit is an accrued benefit.[12] MARY's will also be the first case for this

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[12]For the cases, see the Petition, page 4, footnote 6. Claimant relied on the finding of three Circuit Courts that pre-REA, unearned ERBs were not accrued benefits, but subsidies. This was for its proposition that an earned ERB, post-REA was still not an accrued benefit. The California Supreme Court wrongly agreed. That ERBs and subsidies alike be treated as accrued benefits at §1054(g)(2) is a REA enactment. Claimant now argues that §1054(g)(2) "is not implicated" (Response, p. 23), to assert it may act in a manner prohibited by amendment. It further now inserts into the universal meaning of "earned" the additional element of actual retirement. Response, p. 8, ¶2. See for example, *Mead Corp. v. Tilley*

Court to explain the exception to ERISA supersedure provided for state law related to QDROs, and in the intended context of the exception—pension benefits. This Court can now write the forward, the text, or at least several chapters for the course so sorely needed on federal regulation of retirement plans.

Therefore Petitioner respectfully prays this Honorable Court grant her Petition for writ of certiorari, settle the Questions Presented, and begin instruction on the federal regulation of retirement plans and benefits.

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Respectfully submitted,

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(1989) 490 U.S. 714, 719 ("Plan participants who completed ten years of service attained a vested right to accrued benefits, that is, those benefits earned under the Plan.") Emphasis added. Claimant also ignores that ERISA prohibits it from using any provision in the Plan requiring actual retirement, if it existed, to determine a domestic relations order not a QDRO. §1056(d)(3)(E)(i)(II).